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No. 83-436

In the Supreme Court of the United States

OCTOBER TERM, 1983

DONALD REGAN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

RUTH WALD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Section 101(b) of Pub. L. No. 95-223, 91 Stat. 1625, provides that the "authorities * * * being exercised" with respect to a country on July 1, 1977, under Section 5(b) of the Trading With the Enemy Act may continue to be exercised with respect to that country thereafter. On July 1, 1977, Treasury Department regulations prohibited all unlicensed property transactions related to Cuba, and a general license authorized many (but not all) travel-related transactions involving Cuba. The question presented is whether, under Section 101(b), the President may narrow the terms of this general license and restrict travel-related economic transactions involving Cuba.

PARTIES TO THE PROCEEDINGS

In addition to Donald Regan, Secretary of the Treasury, the following are also petitioners: John M. Walker, Jr., Assistant Secretary of the Treasury for Enforcement and Operations; Dennis M. O'Connell, Director, Office of Foreign Assets Control, Department of the Treasury; George P. Shultz, Secretary of State; and Ronald Wilson Reagan, President of the United States. In addition to Ruth Wald, the following are also respondents: Marian Lowe, Rosario Morales, Francis E. Bradley, Reverend Alice Hageman, Cuba Resources Group, Robert C. Howard, Center for Cuban Studies, and Linda Turner.

Intervening plaintiffs in the district court were Puerto Rico Olympic Committee and Rafael Morales Cabranes, on his own behalf and on behalf of the Asociacion de Turistas Olimpicos de Puerto Rico (Atoprico), and other Puerto Rican sports fans. The intervening plaintiffs did not participate in the court of appeals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes and regulations involved	2
Statement:	
A. Background of the challenged regulation	2
B. Proceedings in the courts below	10
Introduction and summary of argument	13
Argument:	
The grandfather clause preserved the President's TWEA authority to regulate travel-related economic transactions involving Cuba	18
I. Authority to regulate travel-related economic transactions was encompassed by the TWEA "authorities" being "exercised" with respect to Cuba on July 1, 1977, and was therefore preserved by the grandfather clause	18
II. In enacting the grandfather clause Congress acted against a long tradition of according the President regulatory flexibility to adjust foreign assets control programs to meet changing foreign policy and national security needs	30
III. The legislative history of the grandfather clause shows that Congress intended to preserve the President's authority under TWEA to regulate travel-related economic transactions involving Cuba	38
IV. The regulation at issue is not excluded from grandfathered TWEA authority on the ground that it has an incidental effect on travel	52
Conclusion	59
Appendix	1a

TABLE OF AUTHORITIES

Cases: Page

American Documentary Films, Inc. v. *Secretary of the Treasury*, 344 F. Supp. 703 57
Aptheker v. *Secretary of State*, 378 U.S. 500....53, 55, 56
Atlee v. *Nixon*, 336 F. Supp. 790 11
Blum v. *Bacon*, 457 U.S. 132 37
Brown v. *Glines*, 444 U.S. 348 57
Califano v. *Aznavorian*, 439 U.S. 170 ..... 53, 56
Califano v. *Torres*, 435 U.S. 1 56
Clark v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480 32
Curran v. *Laird*, 420 F.2d 122 34
Dames & Moore v. *Regan*, 453 U.S. 654 .....23, 24, 30, 32, 33, 34
E.W. Bliss Co. v. *United States*, 248 U.S. 37..... 34
FEC v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27 37
Guessefeldt v. *McGrath*, 342 U.S. 308 32
Haig v. *Agee*, 453 U.S. 280 .....33, 53, 55, 56, 57
INS v. *Chadha*, No. 80-1832 (June 23, 1983)..... 6
Kent v. *Dulles*, 357 U.S. 116 .....52, 53, 54, 55, 56
Kleindienst v. *Mandel*, 408 U.S. 753 57
Lorillard v. *Pons*, 434 U.S. 575 33
Lyon v. *Singer*, 339 U.S. 841 32
Mackenzie v. *Hare*, 239 U.S. 299 34
Meyers v. *Nixon*, 339 F. Supp. 1388 11
Morton v. *Mancari*, 417 U.S. 535 58
Nielsen v. *Secretary of the Treasury*, 424 F.2d 833 30
NLRB v. *Gullett Gin Co.*, 340 U.S. 361 33
Orvis v. *Brownell*, 345 U.S. 183 .....23-24, 32
Propper v. *Clark*, 337 U.S. 472 ..... 31, 32
Sardino v. *Federal Reserve Bank*, 361 F.2d 106, cert. denied, 385 U.S. 898 32
Snepp v. *United States*, 444 U.S. 507 57
Tagle v. *Regan*, 643 F.2d 1058 5
Teague v. *Regional Commissioner of Customs*, 404 F.2d 441, cert. denied, 394 U.S. 977 57
TVA v. *Hill*, 437 U.S. 153 58
Udall v. *Tallman*, 380 U.S. 1 37

Cases—Continued: Page

United States v. *Broverman*, 180 F. Supp. 631 31
United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 34
United States v. *Frade*, 709 F.2d 1387 37
United States v. *O'Brien*, 391 U.S. 367 57
Veterans & Reservists for Peace in Vietnam v. *Regional Commissioner of Customs*, 459 F.2d 676, cert. denied, 409 U.S. 933 57
Weinberger v. *Rossi*, 456 U.S. 25 34
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 54
Zemel v. *Rusk*, 381 U.S. 1 ..... 3, 34, 55, 56
Zenith Radio Corp. v. *United States*, 437 U.S. 443 .. 37
Zittman v. *McGrath*, 341 U.S. 446 ..... 31, 32

Constitution, statutes, and regulations:

U.S. Const.:
Amend. I 11, 26, 35, 55, 56, 57
Amend. V 52

Act of Oct. 6, 1917, ch. 106, 40 Stat. 411 4
Act of Mar. 9, 1933, ch. 1, 48 Stat. 1 5
Foreign Assistance Act of 1961, 22 U.S.C. 2370(a) .. 4
International Emergency Economic Powers Act, 50 U.S.C. (Supp. V) 1701 *et seq.* 5

50 U.S.C. (Supp. V) 1701 ..... 6, 36
50 U.S.C. (Supp. V) 1702 (b) (1) 26
50 U.S.C. (Supp. V) 1703 6
50 U.S.C. (Supp. V) 1706(b) 6

National Emergencies Act of 1976, 50 U.S.C. (& Supp. V) 1601 *et seq.* 5, 39

50 U.S.C. 1622 6
50 U.S.C. 1651(a) (1) 5, 40
50 U.S.C. 1651(b) 40

Passport Act, 22 U.S.C. 211a 11, 57
Trading With the Enemy Act of 1917, 50 U.S.C. App. (& Supp. V) 1 *et seq.* 3-4

§ 5(b), 50 U.S.C. App. 5(b) ..... *passim*
§ 5(b) (1), 50 U.S.C. App. 5(b) (1) 19, 1a

Constitution, statutes, and regulations—Continued: Page

§ 5(b)(1)(A), 50 U.S.C. App. 5(b)(1)(A) 19
§ 5(b)(1)(B), 50 U.S.C. App. 5(b)(1)(B) 19, 45
§ 16, 50 U.S.C. App. (Supp. V) 16 4

Pub. L. No. 95-223, 91 Stat. 1625 *et seq.* 5
Title I, 91 Stat. 1625 .... 5, 6
§ 101(b), 91 Stat. 1625 .... 7, 2a
Title II, 91 Stat. 1626 5

31 C.F.R. Pt. 500 3
§ 500.201 31

31 C.F.R. Pt. 515 3
§ 515.201(b) 7, 3a
§ 515.203(a) 8
§ 515.310 .... 8, 21
§ 515.311 .... 8, 21
§ 515.415 37
§ 515.559 35
§ 515.560 .... 9, 10, 12, 22, 4a
§ 515.805 .... 8, 9, 23

31 C.F.R. Pt. 515 (1976):
§ 515.559(a)(2) 21

31 C.F.R. Pt. 515 (1977):
§ 515.201(b) 8
§ 515.560 .... 8, 24, 10a
§ 515.560(a) 8
§ 515.560(a)(3) 9, 23
§ 515.560(a)(5) 9, 23
§ 515.560(a)(7) 9, 23
§ 515.601 23
§ 515.602 23
§ 515.805 .... 9, 23

15 Fed. Reg. 9040 (1950) 31
28 Fed. Reg. (1963):
p. 6975 .... 7, 8
pp. 6976-6977 21
p. 6977 21
p. 6985 8

Constitution, statutes, and regulations—Continued: Page

36 Fed. Reg. 8584 (1971) 31
42 Fed. Reg. 16621 (1977) 8
43 Fed. Reg. 40449 (1978) 7
44 Fed. Reg. 53153 (1979) 7
45 Fed. Reg. (1980):
p. 7224 31
p. 59549 7
46 Fed. Reg. 45321 (1981) 7
47 Fed. Reg. (1982):
p. 17030 ..... 9, 35
p. 32060 9
p. 39797 7
48 Fed. Reg. 40695 (1983) 7
Sup. Ct. R. 19.6 11

Miscellaneous:

123 Cong. Rec. (1977):
p. 22475 45
p. 38166 45
Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations, 95th Cong., 1st Sess. (1977) ..... *passim*
8 Foreign Affairs Manual (1966) 21
Exec. Order No. 8389, 3 C.F.R. 645 (1940) 30
Exec. Order No. 9193, 3 C.F.R. 1174 (1942) 5
H.R. Rep. 95-459, 95th Cong., 1st Sess. (1977) 5, 6, 39, 40, 41, 44
Malloy, *Embargo Programs of the United States Treasury Department*, 20 Colum. J. Transnat'l L. 485 (1981) 31
National Emergencies Act: Hearings on H.R. 3884 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) 39-40

Miscellaneous—Continued: Page

National Emergency: Hearings Before the Senate Special Committee on the Termination of the National Emergency, Part I, 93d Cong., 1st Sess. (1973) 39
Resolution I of the Ninth Meeting of Consultation of Ministers of Foreign Affairs (July 22, 1964), *reprinted in* II *Inter-American Treaty of Reciprocal Assistance Applications, 1948-72* (General Secretariat, Organization of American States 1973) 3
Resolution VIII of the Eighth Meeting of Consultation of Ministers of Foreign Affairs Acting Under the Inter-American Treaty of Reciprocal Assistance (Jan. 31, 1962), *reprinted in* II *Inter-American Treaty of Reciprocal Assistance Applications, 1948-72* (General Secretariat, Organization of American States 1973) 3
S. Rep. 93-549, 93d Cong., 1st Sess. (1978) 39
S. Rep. 94-1168, 94th Cong., 2d Sess. (1976) 39
S. Rep. 95-466, 95th Cong., 1st Sess. (1977) 45
Sommerfield, *Treasury Regulations Affecting Trade With the Sino-Soviet Bloc and Cuba*, 19 Bus. Law. 861 (1964) 31
Staff of House Comm. on International Relations, 95th Cong., 1st Sess., *Markup on Revision of Trading With the Enemy Act* (Comm. Print 1977) 51
Staff of Subcomm. on International Trade and Commerce of the House Comm. on International Relations, *Executive Documents Concerning Regulation of International Transactions in Time of Declared National Emergency* (Comm. Print 1976) 46
Treasury Dep't Order No. 128 (Rev. 1, Oct. 15, 1962) 5
United States-Cuba Trade Promotion: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations, 94th Cong., 2d Sess. (1976).. 21
13 Weekly Comp. Pres. Doc. 1940 (Dec. 28, 1977).. 45

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) and the memorandum of the court of appeals accompanying its order denying rehearing (Pet. App. 15a-19a) are reported at 708 F.2d 794. The order of the district court denying a motion for preliminary injunction (Pet. App. 22a-23a) and the magistrate's report recommending denial of the motion for preliminary injunction (Pet. App. 24a-44a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on May 16, 1983. A timely petition for rehearing was denied on June 16, 1983 (Pet. App. 20a). The petition for a writ of certiorari was filed on September 14, 1983, and was granted on November 28, 1983 (J.A. 197). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are reproduced at App. 1a-12a, *infra*.

STATEMENT

A. Background of the Challenged Regulation

1. The United States does not enjoy—and for a quarter century has not been able to enjoy—normal relations with the Government of Cuba; and the management of relations with Cuba has posed some of the most difficult, sensitive and troublesome foreign policy problems presented to our government.[1] Throughout this time it has been an important objective of United States foreign policy to discourage the Cuban Government from activities inimical to the interests of the United States and its allies, particularly Cuban attempts to subvert and destabilize governments in Central America and the Caribbean region.[2] To this end, the United States has for

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[1] Declaration of Myles R.R. Frechette, Director, Office of Cuban Affairs, Department of State ¶ 4 (J.A. 107). A principal objective of the Cuban Government has been the overthrow of non-Communist governments in the western hemisphere. Declaration of Thomas O. Enders, Assistant Secretary of State for Inter-American Affairs ¶ 5 (J.A. 172). In particular, since 1978 Cuba, with the political, economic, and military support of the Soviet Union, has provided widespread support for armed violence and terrorism in the western hemisphere; in addition, Cuba maintains close to 40,000 troops in various countries in Africa and the Middle East in support of objectives inimical to United States foreign policy interests. Frechette Declaration ¶ 4 (J.A. 107).

The declaration of Mr. Frechette was submitted to the district court in connection with the government's response to respondents' motion for preliminary injunction. The declarations of Assistant Secretary Enders and other government officials, which update and expand declarations submitted to the district court, were filed in the court of appeals and in this Court in connection with the government's applications for stay of the mandate. We draw on these declarations in explaining the history and purpose of the Cuban Assets Control Program and the regulations at issue here.

[2] Declaration of James H. Michel, Acting Assistant Secretary of State for Inter-American Affairs ¶ 3 (J.A. 178); Enders Declaration ¶ 5 (J.A. 172); Frechette Declaration ¶ 4 (J.A. 107).

more than two decades maintained a delicate and extensive system of oversight over the relations of our country with Cuba and the Cuban Government.[3]

A critical constituent of this system has, since 1963, been a wide-ranging prohibition of all unlicensed property transactions between persons subject to the jurisdiction of the United States and Cuba or Cuban nationals.[4] This embargo program has given the United States some leverage over Cuban conduct.[5] By restricting Cuban access to hard currency, the program has made it more difficult for Cuba to finance destabilizing activity in Central America and the Caribbean region, and has served to dissociate the United States from these Cuban ventures.[6] During these 20 years, Presidents have made various adjustments in the embargo through amendment of the Cuban Assets Control Regulations issued by the Department of the Treasury, 31 C.F.R. Pt. 515. The embargo program has thus been a flexible instrument of foreign policy, sensitive to the particular state of relations between the United States and Cuba.[7]

2. Authority for the Cuban Assets Control Regulations derives from the Trading With the Enemy Act of

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[3] In adopting this system, the United States acted in coordination with other countries of the western hemisphere. See Resolution VIII of the Eighth Meeting of Consultation of Ministers of Foreign Affairs Acting Under the Inter-American Treaty of Reciprocal Assistance (Jan. 31, 1962) and Resolution I of the Ninth Meeting of Consultation of Ministers of Foreign Affairs (July 22, 1964), *reprinted in* II *Inter-American Treaty of Reciprocal Assistance Applications, 1948-72*, at 77-78, 215-216 (General Secretariat, Organization of American States 1973). See *Zemel* v. *Rusk*, 381 U.S. 1, 14-15 & n.15 (1965).

[4] Enders Declaration ¶ 6 (J.A. 172-173); June 23, 1983, Declaration of John M. Walker, Jr., Assistant Secretary of the Treasury for Enforcement and Operations ¶ 3 (J.A. 184).

[5] Michel Declaration ¶ 3 (J.A. 178-179).

[6] *Ibid.*; June 23, 1983, Walker Declaration ¶ 3 (J.A. 184).

[7] See page 31, *infra*; Pet. 20-21 nn. 32-33. Parallel regulatory provisions governing embargoes against North Korea, Vietnam, and Cambodia (Kampuchea) appear in the Foreign Assets Control Regulations, 31 C.F.R. Pt. 500.

1917 (TWEA), 50 U.S.C. App. 1 *et seq.*[8] Prior to its amendment in 1977, Section 5(b) of the TWEA, 50 U.S.C. App. 5(b), gave the President, "[d]uring the time of war or during any other period of national emergency declared by the President," authority

> under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise [to]—
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, * * *.

Section 5(b) thus gave the President extensive powers to impose wide-ranging economic measures during peacetime national emergencies as well as in times of war.[9]

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[8] The Cuban Assets Control Regulations also are issued under the authority of the Foreign Assistance Act of 1961, 22 U.S.C. 2370(a), which authorizes the President to establish and maintain a total embargo on all trade between the United States and Cuba. However, TWEA authority is of primary importance because it provides for various enforcement tools, such as subpoena power, mandatory recordkeeping, and criminal penalties, and permits the blocking or "freezing" of assets and control of certain financial transactions unrelated to trade that might not be reached under the Foreign Assistance Act of 1961.

Violation of regulations promulgated under the TWEA constitutes a felony punishable by imprisonment of not more than 10 years and/or a fine of not more than $50,000. 50 U.S.C. App. (Supp. V) 16. There are no civil penalties for violations of the regulations.

[9] The TWEA was passed during World War I. Act of Oct. 6, 1917, ch. 106, 40 Stat. 411. Originally it authorized use of the specified economic powers only during times of war. In 1933, Sec-

In 1976 Congress enacted the National Emergencies Act, 50 U.S.C. 1601 *et seq.*, which provided for termination in 1978 of previously declared national emergencies and established new procedures for declaring national emergencies in the future. However, Congress exempted certain statutes, including TWEA Section 5(b), from the operation of the National Emergencies Act. 50 U.S.C. 1651(a)(1). Congress concluded that, because Section 5(b) constituted the authority for continuing foreign policy programs, further study was necessary to determine how those programs would be affected by terminating previously declared national emergencies. See H.R. Rep. 95-459, 95th Cong., 1st Sess. 6-7 (1977). It was after such study, in 1977, that Congress finally decided to create a new procedural framework for the President's exercise of peacetime emergency economic powers by enacting Pub. L. No. 95-223 (Public Law 95-223), 91 Stat. 1625 *et seq.*

Title I of the new statute amended the TWEA to confine—(with the exception of certain grandfathered authorities)—the President's use of Section 5(b) powers to periods of war. Title II of Public Law 95-223, known as "IEEPA"—the International Emergency Economic Powers Act, 50 U.S.C. (Supp. V) 1701 *et seq.*[10]—established new predicates and procedures for the President's peacetime exercise of international emergency economic powers. Under IEEPA, the President has authority to exercise such powers only if there exists "any unusual and extraordinary threat, which has its source * * * outside the United

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tion 5(b) was amended to extend those powers to times of peacetime national emergency. Act of Mar. 9, 1933, ch. 1, 48 Stat. 1. See *Tagle* v. *Regan*, 643 F.2d 1058 (5th Cir. 1981) (historical discussion).

The President has delegated his authority under the TWEA to the Secretary of the Treasury, who in turn has delegated that authority to the Office of Foreign Assets Control. See Exec. Order No. 9193, 3 C.F.R. 1174, 1175 (1942); Treasury Dep't Order No. 128 (Rev. 1, Oct. 15, 1962).

[10] References to 50 U.S.C. in connection with Public Law 95-223 will hereafter omit "Supp. V."

States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such a threat." 50 U.S.C. 1701. The President has to report to Congress every six months on such an emergency. Once such an "unusual and extraordinary threat" is found to exist, however, the President has—with certain qualifications—the same broad powers under IEEPA that he had under the TWEA.[11]

At the same time it altered the scheme governing the President's exercise of powers during future peacetime national emergencies, Congress carefully provided for *continuation* of presidential authority under TWEA Section 5(b) to exercise economic powers with respect to those countries—Cuba, North Korea, Vietnam, and Cambodia (Kampuchea)—for which financial and trade transactions were currently subject to embargo. Congress decided that the President should not be required to declare a new national emergency in order to continue these existing foreign embargo programs, so long as he determined annually that continuation of such a program was in the national interest. Congress therefore included a "grandfather clause" in Title I of Public Law

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[11] Under the TWEA, the existence of one declared emergency was a sufficient predicate for exercise of any of the authorities provided under the Act with respect to any country. Under IEEPA, the President must declare a new national emergency with respect to each specific threat (using the procedures established by the National Emergencies Act) before initiating the exercise of emergency economic powers with respect to that threat. 50 U.S.C. 1703. Under the National Emergencies Act, Congress purported to retain the power to terminate a declared national emergency by concurrent resolution. 50 U.S.C. 1622. Such termination apparently would cut off the use of emergency authorities. 50 U.S.C. 1706(b). But see *INS* v. *Chadha*, No. 80-1832 (June 23, 1983).

Under IEEPA, the President does not have the power to vest foreign assets (*i.e.*, to place ownership in the United States), to regulate purely domestic transactions, or to seize records, as he did under Section 5(b) of the TWEA. See H.R. Rep. 95-459, 95th Cong., 1st Sess. 14-15 (1977). (Legislative materials relating to Public Law 95-223 were reproduced in a Legislative History Appendix filed by the parties in the court of appeals.)

95-223, which preserves the Section 5(b) authorities being exercised with respect to a country as of July 1, 1977. The grandfather clause—Section 101(b) of Public Law 95-223, 91 Stat. 1625—provides (emphasis added):

> [T]*he authorities conferred upon the President by section 5(b)* of the Trading With the Enemy Act, *which were being exercised with respect to a country on July 1, 1977*, as a result of a national emergency declared by the President before such date, *may continue to be exercised with respect to such country*, except that, unless extended, the exercise of such authorities shall terminate * * * at the end of the two-year period beginning on the date of enactment of the National Emergencies Act [September 14, 1976]. The President may extend the exercise of such authorities for one-year periods upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States.

Pursuant to the grandfather clause, Presidents Carter and Reagan have in every year since 1978 determined that it is in the national interest to continue the exercise of TWEA authorities with respect to Cuba, North Korea, Vietnam, and Cambodia.[12]

3. Section 5(b) of the TWEA delegates to the President wide authority to "regulate, direct and compel, nullify, void, prevent, or prohibit" any "transfer" of any "property" or any "transactions involving any property" in which "any foreign country or a national thereof has any interest." Pursuant to this authority, ever since 1963 the Cuban Assets Control Regulations have prohibited, "except as specifically authorized by the Secretary of the Treasury * * * transactions involv[ing] property in which [Cuba] has * * * any interest of any nature whatsoever, direct or indirect * * *." 31 C.F.R. 515.201(b); 28 Fed. Reg. 6975 (1963). The effect of this sweeping groundrule regulation—which we will

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[12] See 48 Fed. Reg. 40695 (1983); 47 Fed. Reg. 39797 (1982); 46 Fed. Reg. 45321 (1981); 45 Fed. Reg. 59549 (1980); 44 Fed. Reg. 58153 (1979); 43 Fed. Reg. 40449 (1978).

hereafter refer to, simply, as "Regulation 201(b)"—is to subject *all* property transactions involving Cuba, and engaged in by persons subject to United States jurisdiction, to a comprehensive regulatory licensing regime. Regulation 201(b) prohibits persons subject to United States jurisdiction from engaging directly or indirectly in unlicensed economic transactions *of any kind* with Cuba or Cuban nationals, including transactions incident to travel to and within Cuba.[13] *Regulation 201(b) was in force on July 1, 1977, and continues in full force and effect today.*

The Cuban Assets Control Regulations further provide (and have at all relevant times provided) that any regulation or license "may be amended, modified, or revoked at any time" (31 C.F.R. 515.805; 28 Fed. Reg. 6985 (1963)).[14]

In March 1977, President Carter decided to modify United States policy with respect to economic transactions incident to travel to Cuba. Accordingly, the Department of the Treasury promulgated 31 C.F.R. 515.560 (1977), 42 Fed. Reg. 16621 (1977), which constituted a general license ("the 1977 general license") authorizing transactions "ordinarily incident to" travel to and within Cuba.[15] It gave permission to persons visiting

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[13] See 31 C.F.R. 515.310, 515.311; see further pages 20-21 note 21, *infra*.

[14] The regulations also specify that "[a]ny transfer * * * which is in violation of any provision of this part or of any regulation * * * license or other direction or authorization * * * and involves any property in which a designated national has or has had an interest * * * is null and void * * *" (31 C.F.R. 515.203(a); 28 Fed. Reg. 6975 (1963)).

[15] The general license, 31 C.F.R. 515.560(a) (1977), provided in part:

> The following transactions are authorized:
>
> (1) All transactions ordinarily incident to travel to and from Cuba.

Cuba to pay for their transportation and living expenses (*e.g.*, meals, hotel bills, taxis) while in Cuba. However, the 1977 general license prohibited (i) such persons from buying and bringing back to the United States more than $100 worth of Cuban goods for personal use, 31 C.F.R. 515.560(a)(3) (1977), (ii) transactions incident to regularly scheduled flights and voyages to and from Cuba, 31 C.F.R. 515.560(a)(5) (1977), and (iii) domestic credit card issuers from entering into contracts with Cuban enterprises for issuing credit to travelers, 31 C.F.R. 515.560(a)(7) (1977). And the 1977 general license was, of course, continuously subject to the general provisions of 31 C.F.R. 515.805, providing that any regulation or license issued in connection with the Cuban Assets Control Program may be "amended, modified, or revoked" at any time.

In late 1981, it became apparent to the United States that the Cuban Government was increasing its efforts to destabilize Central American governments and at the same time was initiating a program to increase its hard currency earnings by attracting tourists from the United States.[16] In May 1982, in order to "reduce Cuba's hard currency earnings from travel by United States persons to and within Cuba," the Department of the Treasury amended 31 C.F.R. 515.560 to modify the 1977 general license for travel-related economic transactions involving Cuba. 47 Fed. Reg. 17030 (1982).[17] It is this modifica-

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(2) All transactions ordinarily incident to travel in Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there.

(3) The purchase in Cuba, and importation as accompanied baggage, of merchandise with a foreign market value not to exceed $100 per person, for personal use only. Such merchandise may not be resold. The authorization in this subparagraph may only be used once in every six consecutive months.

[16] See pages 34-35, *infra*.

[17] In July 1982, 31 C.F.R. 515.560 was further amended to clarify the scope of the general and specific licenses and the meaning of certain terms. 47 Fed. Reg. 32060 (1982).

tion that is at issue here. As amended, Section 515.560 provides that the general license to engage in travel-related transactions is limited to persons engaged in official travel, visits to close relatives, "fully sponsored or hosted" travel (*i.e.*, travel that does not involve transfer of economic benefit from Americans to Cuba), and travel related to news-gathering, professional research, or similar activities. The amended regulation also provides that specific licenses may be granted in the case of travel for humanitarian reasons or for purposes of public performances in Cuba in connection with cultural or sports events. The general effect of the amendments was to adjust the 1977 general license by withdrawing authorization for transactions incident to ordinary private business and tourist travel.

B. Proceedings in the Courts Below

1. In June 1982, respondents, who are individuals interested in travel to Cuba and two groups that organize tours to Cuba, filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Massachusetts.[18] Respondents claimed that

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[18] One respondent, the Center for Cuban Studies, applied to the Office of Foreign Assets Control of the Department of the Treasury for a license to permit 98 named individuals to engage in transactions relating to an interdisciplinary study tour. That blanket application was denied, but the Office of Foreign Assets Control invited the individual applicants to provide more specific information that would allow the Office to determine whether their proposed travel might be covered by a general or specific license under the 1982 regulation. See J.A. 69-70. (Subsequently, 45 persons filed individual applications; of these, 38 were informed that they qualified for a license, primarily as professional researchers. The Office rejected three of the applications and did not act on four others because they were withdrawn or because there was no response to the Office's request for additional information.) Respondent Bradley sought a license that would allow him to travel to Cuba with a group of high school students. See J.A. 82-83. The Office of Foreign Assets Control denied the application on the ground that the proposed trip did not fall within either the general or specific

the restrictions on travel-related economic transactions imposed by the May 1982 amendment to the 1977 general license violated 22 U.S.C. 211a, which prohibits area restrictions on passports except in certain circumstances; exceeded the authority conferred by Section 5(b) of the TWEA and by IEEPA; had not been promulgated pursuant to IEEPA procedures; and violated respondents' First Amendment and due process rights, including their right to travel.

Respondents' request for a preliminary injunction was referred to a magistrate.[19] Following briefing and argument, the magistrate recommended that a preliminary injunction be denied (Pet. App. 24a-44a). He concluded that Congress did not, by the grandfather clause, intend to freeze in place only the specific restrictions that happened to be in effect on July 1, 1977 (*id.* at 36a). Because transactions related to Cuban travel were being regulated on that date (albeit by a regulation authorizing most such transactions by general license), the magistrate concluded that the grandfather clause gave the President the authority in 1982 to change the scope of that regulation (*ibid.*). The magistrate also concluded that an injunction against enforcement of the regulation would cause irreparable injury to the government's conduct of its foreign affairs and that that injury out-

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licenses authorized by the regulations (J.A. 128-129). The other respondents did not apply for licenses.

Respondents named Ronald Wilson Reagan, President of the United States, as a defendant in the district court. We believe President Reagan is not a proper party to this suit. See, *e.g.*, *Meyers* v. *Nixon*, 339 F. Supp. 1388, 1391 (S.D. N.Y. 1972); *Atlee* v. *Nixon*, 336 F. Supp. 790 (E.D. Pa. 1972). However, the decisions below were issued on respondents' motion for preliminary injunction, prior to the filing of an answer or any motion for dismissal of parties. Because President Reagan was named as a party below, we have included him as a petitioner in this Court. See Sup. Ct. R. 19.6.

[19] In the meantime, respondent Bradley obtained a temporary restraining order permitting him to travel to Cuba pending a hearing on the motion for preliminary injunction. See Pet. App. 45a.

weighed any inconvenience to respondents resulting from postponement of their planned travel (*id.* at 40a-42a).

After considering written and oral objections to the magistrate's report, the district court denied the motion for a preliminary injunction (Pet. App. 22a-23a). The court concluded that respondents were not likely to succeed on the merits of either their statutory or constitutional claims.

2. The court of appeals vacated the district court's order and remanded with instructions to issue a preliminary injunction against enforcement of 31 C.F.R. 515.560 (Pet. App. 1a-14a). It concluded that the grandfather clause did not authorize the 1982 amendment to the 1977 general license, that the government had failed to follow IEEPA procedures in amending that regulation, and that the amended regulation was therefore invalid. The court declined to reach respondents' other statutory and constitutional contentions.

The court of appeals' holding that the grandfather clause did not authorize the 1982 amendment to the 1977 general license was based on its conclusion that on July 1, 1977, the Treasury Department was "*not* restricting *travel* to Cuba" (Pet. App. 4a) (emphasis in original). The court recognized that on that date the government was restricting commodity transactions involving Cuba, but opined that restrictions on travel-related transactions constituted a "very different 'exercise[]' of authority" (*id.* at 5a). The court found support for its holding in this Court's directives to lower courts to construe narrowly all delegated powers that curtail the right to travel (*id.* at 11a-12a). The court stated that its holding would not prevent the President from regulating travel-related property transactions, since he could use IEEPA procedures to do so (*id.* at 12a), and that a narrow construction of the grandfather clause would be consistent with Congress's overall intent to "impos[e] Congressional limits upon the President's restrictive powers," reflected in, inter alia, the 1978 amendment to the Passport Act (*id.* at 12a-13a).

The court of appeals denied the government's petition for rehearing and suggestion for rehearing en banc, as well as its request for stay of the mandate (Pet. App. 15a-20a). The court rejected the government's submission that the combination of controls that the President had in force on July 1, 1977—(i) a general prohibition on all unlicensed property transactions with Cuba (Regulation 201(b)), (ii) a revocable general license giving permission for many travel-related property transactions (the 1977 general license), and (iii) continuing restrictions on some travel-related transactions not authorized by the 1977 general license—did, together, constitute "exercise" of the "authority" to regulate travel-related (as well as all other property) transactions involving Cuba. The court acknowledged that "others could reasonably conclude that the legislative history is ambiguous and should be read differently;" but the court doubted that "a reasonable reader could conclude that the relevant legislative history *clearly* supports the government" (*id.* at 19a).

On July 6, 1983, this Court granted the government's application for a stay of the mandate (Brennan, J., and Stevens, J., dissenting).

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the court of appeals invalidated an important component of the Cuban Assets Control Program and thereby placed an unwarranted restriction on the President's authority to carry out our country's foreign policy toward Cuba. Under this program succeeding Presidents have, continuously since 1963, used TWEA authority comprehensively to regulate economic transactions with Cuba, as one element in the management of our delicate and difficult relations with the Government of Cuba. The court of appeals held that this TWEA authority may not be used to adjust the regulations with respect to those economic transactions that are related to travel to Cuba. Instead, the court of appeals held, travel-related economic transactions may only be regulated pur-

suant to a new, separate, "national emergency" with respect to Cuba to be declared by the President under IEEPA. This must be done, said the court of appeals, even though other property transactions involving Cuba may continue to be regulated by the President pursuant to his grandfathered authorities under the TWEA—authorities that Presidents Carter and Reagan have annually renewed as being in the national interest ever since the passage of the grandfather clause.

The court of appeals' holding is based on a narrow and artificial reading of the governing statutes and regulations. It means that restrictions on the purchase of Cuban cigars may continue to be imposed under the TWEA, whereas restrictions on the purchase of Cuban hotel rooms and restaurant meals must be imposed pursuant to a new, separate, national emergency, to be declared by the President with respect to Cuba under IEEPA. It apparently also means that the restrictions imposed by the TWEA embargo with respect to Cuba—and, presumably, those with respect to North Korea, Vietnam, and Cambodia—are "frozen" as of July 1, 1977, and may not be adjusted in light of changing foreign policy circumstances. Such a reading makes no sense; is inconsistent with Congress's intent; and creates undesirable rigidities in the conduct of our foreign relations.

Our central submission is straightforward: on July 1, 1977, the President was exercising comprehensive TWEA authority to regulate *all* property transactions with Cuba; encompassed within this authority was the power to adjust the Cuban Assets Control Program in light of changing foreign policy needs; the authority to continue to regulate—and to adjust—was expressly grandfathered; and there exists no reason to carve the power to regulate travel-related economic transactions out of this comprehensive regulatory regime and to constitute it as a "separate" authority to be regulated under a new national emergency declaration under a separate statute.

1. A natural and sensible reading of the grandfather clause indicates that Congress intended to preserve the President's TWEA authority to regulate travel-related economic transactions involving Cuba. The "authorities * * * being exercised" with respect to Cuba on July 1, 1977, included Regulation 201(b), which constitutes a comprehensive prohibition on all unlicensed property transactions between persons subject to United States jurisdiction and Cuba or Cuban nationals. That broad prohibition reaches both trade in commodities (sugar, or cigars) and economic transactions relating to Cuban travel.

In March 1977 President Carter exercised his licensing authority to ease the broad restriction on travel-related transactions by promulgating a revocable and qualified general license permitting most such transactions. But the temporary loosening of the restriction itself constituted an exercise of the President's Section 5(b) authority to regulate property transactions by "means" of "licenses." Assets control programs have traditionally operated through a combination of a broad general prohibition, which remains in place during the life of a program, and a flexible licensing scheme, which is used to adjust the program; permitting transactions by license cannot be characterized as an absence of regulation.

The court of appeals concluded that Congress intended to distinguish between the authority to regulate travel-related transactions and the authority to regulate "more typical" commercial transactions (Pet. App. 5a). But there is no basis, either in the statute or in common sense, for this disaggregation of Section 5(b) authority. Nor is there any basis for the court's conclusion that a class of transactions can be restricted pursuant to grandfathered TWEA authority only if such transactions were in fact prohibited on July 1, 1977. The grandfather clause refers not to preservation of "restrictions" or "prohibitions," but to preservation of "authorities."

2. Foreign assets control programs have traditionally operated in a flexible manner to meet changing foreign

policy needs. It is against that background that Congress enacted the grandfather clause; it is thus implausible that Congress intended through that clause to freeze into place a static set of prohibitions. It is doubly implausible in light of the fact that TWEA programs are intimately connected to national security and foreign policy interests of the United States. Courts have recognized that the Executive needs considerable flexibility in these areas; accordingly, they have construed generously statutes relating to these subjects. The court of appeals' suggestion that the President could simply use IEEPA procedures to promulgate the same regulation ignores the fact that the effect of a declaration of a new national emergency might itself have grave foreign policy implications. Finally, the Treasury Department has consistently construed the grandfather clause as preserving the President's flexibility to adjust assets control programs; that interpretation by the agency charged with administration of the statute should be accorded deference.

3. The legislative history makes it clear that Congress intended the new IEEPA procedures to apply only to *future* emergencies, and that it enacted the grandfather clause so that the President could continue to administer existing assets control programs under TWEA authority without taking the awkward and inappropriate step of declaring new national emergencies with respect to countries such as Cuba and Vietnam. The legislative history lends no support to the conclusion that Congress was grandfathering simply a frozen set of prohibitions. Nor is there any evidence that Congress viewed the President's power to regulate travel-related economic transactions as based on a separate "authority" from that governing regulation of other property transactions for purposes of the grandfather clause. The legislative history thus supports the conclusion that the President may use grandfathered TWEA authority to make the adjustments in the Cuban Assets Control Program at issue in this case.

4. The court of appeals erred in concluding that constitutional considerations support its narrow construction

of the grandfather clause because the regulation at issue has an incidental effect on travel. Neither Section 5(b) nor the grandfather clause regulates travel as such; nor does either single out travel-related economic transactions for special treatment. Rather, they regulate economic transactions in the broad context of an overall embargo program subjecting our financial and commercial relations with Cuba to comprehensive regulatory monitoring. The purpose of the regulation is not to restrict Americans' freedom of movement but to deny economic benefits to a country engaged in activities inimical to the United States. The court of appeals itself acknowledged that Congress authorized the regulation of travel-related economic transactions with Cuba under IEEPA. The question of statutory construction in this case is, therefore, whether such regulation may proceed under grandfathered TWEA authority or must proceed under IEEPA; constitutional considerations are not relevant to such a choice and should not be used artificially to narrow the President's TWEA authorities.

In any event, the national security and foreign policy interests underlying the Cuban Assets Control Program provide ample constitutional space for the narrowly drawn incidental restrictions the regulations place on travel to Cuba.

The 1978 amendment to the Passport Act does not call for a narrow construction of the grandfather clause. That amendment on its face is addressed only to passport restrictions imposed by the Secretary of State; there is no indication that Congress meant by that Act to repeal a portion of the grandfathered TWEA authority exercised by the Secretary of the Treasury to regulate economic transactions.

ARGUMENT

THE GRANDFATHER CLAUSE PRESERVED THE PRESIDENT'S TWEA AUTHORITY TO REGULATE TRAVEL-RELATED ECONOMIC TRANSACTIONS INVOLVING CUBA

I. Authority To Regulate Travel-Related Economic Transactions Was Encompassed By The TWEA "Authorities" Being "Exercised" With Respect To Cuba On July 1, 1977, And Was Therefore Preserved By The Grandfather Clause

The key question in this case is whether the TWEA Section 5(b) "authorities" being "exercised" with respect to Cuba on July 1, 1977, encompassed authority to regulate travel-related economic transactions. Section 5(b) gave the President the power to "regulate," "prevent" and "prohibit" "*any*" transaction involving "*any*" property in which Cuba or Cubans had "*any*" interest. Pursuant to Section 5(b), ever since 1963 and up to this day, all our Presidents have continuously prohibited—by Regulation 201(b)—*all* transactions involving property in which Cuba has "any interest of any nature whatsoever, direct or indirect"—*unless "specifically authorized"* by the Secretary of the Treasury. The existence in 1977 of Regulation 201(b) alone establishes that the President was affirmatively "exercis[ing]" TWEA Section 5(b) authority to "regulate" *all* United States property transactions with respect to Cuba, and that the authority to do so was, consequently, expressly grandfathered.

A. Congress did not need to define the term "authorities" when it provided in the grandfather clause that Section 5(b) "authorities" being exercised with respect to a country on July 1, 1977, were to be preserved. Those authorities are specified in Section 5(b) itself. They include the power comprehensively to exercise plenary regulatory control over ("regulate, direct and compel, nullify, void, prevent or prohibit") *all* property transactions. This control may be exercised through such "rules and

regulations" as the President may prescribe and "by means of instructions, licenses, or otherwise." There is no good reason not to give these terms their plain and sensible meanings.

We believe that one possible reading of the grandfather clause is that if the President is exercising any Section 5(b) authority with respect to a country on July 1, 1977, he may continue to exercise all 5(b) authorities with respect to that country. This construes the term "authorities * * *, which were being exercised with respect to a country on July 1, 1977" as delimiting the *countries* that may continue to be the objects of a TWEA embargo. This reading gives generous scope to Congress's clearly expressed purpose not to interfere with the President's power to carry forward then-existing embargo programs (see pages 38-52, *infra*).

Alternatively, even if the language is read to suggest that Congress meant to delimit "authorities" not only with respect to target countries, but also with respect to the regulatory tools being used on July 1, 1977, the most natural interpretation is to define the relevant categories of authority in terms of the broad classifications adopted in Section 5(b) itself: (i) authority to control currency, bullion, and securities transactions, as specified in Section 5(b)(1)(A); (ii) authority to control transactions involving property in which a foreign nation or its nationals have any interest, as specified in Section 5(b)(1)(B); and (iii) authority to vest foreign-owned property, as specified in the text of Section 5(b)(1) following subsection (B).[20] On this reading, since the Cuban Assets Control Regulations concededly exercised the authority to control property transactions pursuant to Section 5(b)(1)(B), all such 5(b)(1)(B) authority was being "exercised" on July 1, 1977, and was therefore grandfathered, so that the regulation at issue here—plainly encompassed by Section 5(b)(1)(B)—is valid.

[20] As detailed below, see pages 46, 48, *infra*, the legislative history includes some references to these broad classes of controls.

There is no basis for assuming that when Congress grandfathered Section 5(b) "authorities" being "exercised" with respect to a country, it was referring not to categories of authorities as these are specified in Section 5(b) itself, but rather to classes of goods and services ("sugar" vs. "hotel rooms") being regulated. More specifically, as we further detail below, there is no indication that Congress viewed the President's power to regulate travel-related transactions as based on a separate "authority" from that governing regulation of other property transactions for purposes of the grandfather clause. Section 5(b) is simply not organized in terms of such subject-matter categories; and it is to *Section 5(b)* "authorities" that the grandfather clause refers.

But even if one assumes that Congress intended to preserve the authority to regulate a given subject matter only if that subject matter was subject to a regulatory authority being exercised through the Cuban Assets Control Regulations as they stood on July 1, 1977, the authority to regulate travel-related transactions was grandfathered. An examination of Regulation 201(b) shows that it affirmatively asserts the regulatory authority to decide whether to permit or prohibit *all* property transactions between persons subject to the jurisdiction of the United States and Cuba or Cuban nationals. If this is not an exercise of the "authority" to "regulate" (and to "prevent" and "prohibit") all such transactions, what is? The program established by Regulation 201(b) includes the familiar features of a trade embargo. But it also plainly encompasses all other property transactions, including travel-related economic transactions.[21]

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[21] Payment of funds directly to Cuba or Cuban nationals for meals, lodging or transportation represents the discharge of an indebtedness for goods or services provided and thus is a transaction with respect to property in which Cuba has an interest, as is payment of funds to non-Cuban entities (*e.g.*, an airline) that in turn remit proceeds to Cuba or pay fees to Cuba.

The terms "property," "interest in property," and "transfer" are defined broadly under the regulations. For example, "property" is

Since its promulgation in 1963, the Department of the Treasury has consistently interpreted Regulation 201(b) as encompassing a prohibition on travel-related transactions and has required licenses for persons who wish to engage in such transactions.[22]

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defined to include, inter alia, "money, checks, drafts, * * * debts, indebtedness obligations, * * * contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent" (31 C.F.R. 515.311; 28 Fed. Reg. 6977 (1963)). "Transfer" is defined to include "any * * * transaction * * * whether or not done or performed within the United States, the purpose, intent, or effect of which is to * * surrender, release, [or] transfer * * * any * * * interest with respect to any property * * * includ[ing] the making, execution, or delivery of any * * * check * * *" (31 C.F.R. 515.310; 28 Fed. Reg. 6976-6977 (1963)).

[22] Beginning in 1963, it was routine practice for the Office of Foreign Assets Control to issue specific licenses to named individuals to engage in economic transactions in connection with authorized travel to Cuba. For an example of such a license, see Exhibit B to our supplemental brief filed in the court of appeals.

Since Regulation 201(b) was promulgated, the Treasury Department has sought to secure compliance with the prohibition on travel-related property transactions by, inter alia, investigating persons known to have traveled to Cuba, sending questionnaires to United States businesses with foreign subsidiaries conducting licensed trade with Cuba, and sending letters to various travel magazines, travel agencies, airlines and individuals warning them of the controls and license requirements. See *United States-Cuba Trade Promotion: Hearing Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 2d Sess. 44-46 (1976) (statement of Stanley Sommerfield, Acting Director, Office of Foreign Assets Control, Dep't of the Treasury). See also June 3, 1983, Walker Declaration ¶ 3 (J.A. 159); Frechette Declaration ¶ 6 (J.A. 107).

In addition, 31 C.F.R. 515.559(a)(2) (1976) expressly provided for issuance of licenses to foreign nationals who were employed by foreign subsidiaries of United States corporations and who wished to travel to Cuba in order to arrange licensed trade by the foreign subsidiaries. The State Department handout to persons authorized to travel in Cuba warned of the need to obtain a Treasury Department license in connection with payments for travel expenses, for accommodations, or for services in connection with such travel. See 8 Foreign Affairs Manual § 249.92(c) (1966).

B. The court of appeals' conclusion that the authority to regulate travel-related economic transactions was not "being exercised" on July 1, 1977, was based on a conceptual misunderstanding of the structure of the regulatory system created by the Cuban Assets Control Regulations. The court of appeals focused narrowly on the fact that in March 1977 President Carter took steps to ease restrictions on travel-related property transactions by promulgating a (revocable) general license permitting most such transactions. But the temporary loosening of those restrictions by general license was itself an exercise of the President's TWEA authorities. (Section 5(b) itself characterizes a license as a means of exercising its authorities; it permits the President to regulate "by means of instructions, licenses, or otherwise.") The 1977 general license did not revoke or alter the comprehensive regime of regulatory oversight established by Regulation 201(b). It was simply one exercise of the continuing powers of supervision asserted through that regime. It gave permission—temporary, revocable permission—to engage in certain transactions, but did not in any way exempt them from underlying and continuing regulatory control. It is one thing to act where permission is required and obtained, quite another to act where no permission is needed at all. The general prohibition of all unlicensed transactions remained in force and has been continuously asserted from 1963 to the present.

The court of appeals' assumption that the promulgation of Section 515.560 amounted to *removal* of regulation ignores the regulatory structure, which has always consisted of a combination of two regulatory instruments: a basic broad prohibition, coupled with an ongoing licensing scheme used to make particular exceptions and adjustments.[23] In fact, the 1977 general license itself

[23] Every assets freeze and trade embargo imposed by the Treasury Department since 1940 has possessed the same structure: a general *prohibition* subject to an ongoing *licensing* scheme. See pages 30-32, *infra*. The reason for combining prohibition and

maintained some continuing restrictions on travel-related transactions; for instance, economic transactions incident to travel on scheduled carriers were not allowed.[24] But even if one joins the court of appeals in ignoring those restrictions, there is no reason why only a flat prohibition specific to travel-related transactions should "count" as an exercise of authority eligible for grandfathering.[25]

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licensing is obvious. The sweeping prohibition subjects all transactions to oversight through a unified decision-making process. This is the key concept, necessary in the case of those countries with which our relations are, by hypothesis, extremely delicate and difficult. Licensing decisions then function as the expressions of ongoing foreign policy determinations. Licensing discretion—in both directions—enables the President to fine tune the embargo to meet current foreign policy needs. Sharply different from any of this is the ending of the oversight regime by the removal of the general prohibition—something that occurs when relations with the target country have become normal. Of course, no such stage has been reached in our relations with Cuba—the very fact recognized by the grandfather clause.

[24] 31 C.F.R. 515.560(a)(5) (1977). In addition, under 31 C.F.R. 515.560(a)(3) (1977), travelers were authorized to bring back no more than $100 from Cuba (for personal use only). 31 C.F.R. 515.560(a)(7) (1977) expressly excluded domestic credit card issuers from contracts with Cuban enterprises for extension of credit to travelers. 31 C.F.R. 515.601 (1977) required every person engaging in any transactions subject to the Cuban Assets Control Regulations, whether licensed or not, to keep a full and accurate record of each such transaction. 31 C.F.R. 515.602 (1977) required the production of such records "at any time as may be required by the Secretary of the Treasury."

[25] We note again that, in 1977, the Cuban Assets Control Regulations provided (as they do now) that any license granted thereunder remained at all times subject to amendment, modification, or revocation (see 31 C.F.R. 515.805). This Court has held that significant conditions can be imposed in connection with expressly revocable licenses. In *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), the Court concluded that the President had authority to withdraw general licenses permitting legal actions against Iran, even to the extent of nullifying court orders of attachment issued while such licenses were in effect. (See also *Orvis* v. *Brownell*, 345

C. The court of appeals was also led to its conclusion (that "authority" to regulate travel-related economic transactions was not "being exercised" on July 1, 1977) by an imprecise and confusing amalgam of two different substantive theories about the grandfather clause. The court believed that Congress wished to make a special distinction between travel-related transactions and other sorts of economic transactions in prescribing what authorities were to be grandfathered. The court of appeals also assumed that Congress intended to grandfather only those specific prohibitions that happened to be in place on July 1, 1977—that is, that Congress meant to freeze the regulatory situation as it stood on that date. Both of those theories misapprehend the grandfather clause.

1. The court of appeals, invoking "common sense and common English" (Pet. App. 5a), opined that restricting commodity purchases and restricting travel purchases "would seem to be very different 'exercises' of authority—different enough at least not to count as the exercise of the same authority" (*ibid.*). But the court's distinction is not supported by either the statutory language or "common sense and common English." Nothing in Section 5(b) or the grandfather clause indicates that Congress perceived a distinction between the authority to regulate the purchase of, *e.g.*, Cuban hotel rooms and entertainment packages, and the authority to regulate the purchase of, *e.g.*, Cuban sugar and cigars.

Section 5(b) is subdivided into various broad categories of regulation (*e.g.*, currency regulation; regulation of property transactions); but it does not in any

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U.S. 183 (1953).) The Court characterized the attachments obtained pursuant to the general licenses as "revocable," "contingent," "specifically made subordinate to further actions which the President might take" under the applicable statute (IEEPA), and "in every sense subordinate to the President's power" under the statute. 453 U.S. at 673, 674 n.6. Those descriptions apply fully to licenses issued pursuant to the TWEA, including the 1977 general license issued in Section 515.560.

way isolate or specify as distinct the category of travel-related transactions. Rather, it simply gives the President broad authority to regulate "transactions" that involve "any property in which any foreign country or a national thereof has any interest." Restriction of travel-related transactions deprives Cuba of economic benefits just as effectively as other economic restrictions; in fact, allowing all comers freely to engage in private tourist- and business-travel transactions with Cuba would create a significant loophole in an otherwise comprehensive embargo program. The court of appeals' reading disaggregates Section 5(b) authorities in an arbitrary way, one that finds no support in Section 5(b), in the grandfather clause, or in "common sense and common English." [26]

The court of appeals suggested (Pet. App. 7a) that Congress must have viewed travel-related transactions as special because of the special constitutional interest in travel. As we show below, there is no indication of any kind in the legislative history of the grandfather clause that Congress perceived or adverted to any such special concern. And it is extremely significant that no such concern was manifested in 1977 in IEEPA itself. IEEPA provides that when new peacetime national emergencies arise, the President, following IEEPA procedures, may impose wide ranging economic measures with respect to a particular country. Congress made not the

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[26] The court of appeals cited the practice of Executive Branch agencies to support its view that historically travel restrictions have been regarded as different from "more typical TWEA rules and regulations" (Pet. App. 5a-7a). But the "practice" the court cited amounts to statements by Executive Branch representatives that the President lacked power directly to control *travel*. These statements simply do not address the problem of travel-related economic transactions, particularly in the context of a comprehensive embargo program. They certainly do not establish that, for purposes of TWEA Section 5(b) and the grandfather clause, purchase of Cuban hotel space is an entirely different category of transaction than the purchase of a Cuban cigar.

slightest attempt to provide for special treatment for travel-related economic transactions when these IEEPA powers are being exercised; they are simply thrown in with the other embargo powers that may be exercised under a IEEPA national emergency declaration. (This was, of course, implicitly acknowledged by the court of appeals when it specified that the President may regulate the purchase of Cuban hotel space and airline tickets under IEEPA.)[27] Thus, the notion that Congress intended to treat the authority to regulate economic transactions incident to travel as a distinct category of authority is affirmatively rebutted by the structure of the regulatory system that Congress adopted in 1977 to replace the TWEA.

2. Mixed in with the court of appeals' notion that Congress intended distinctive treatment for the regulation of travel-related property transactions was another, separate, strand in its analysis. The court of appeals concluded that the President was not "exercising" TWEA authority with respect to travel-related economic transactions because, on July 1, 1977, most such transactions were in fact not prohibited but were, rather, licensed pursuant to the 1977 general license. The court in effect read the grandfather clause as preserving the authority to prohibit a transaction only if that transaction was in fact prohibited on July 1, 1977.

The effect of this interpretation of the grandfather clause is, of course, to freeze into place the specific list of prohibitions that happened to be on the books on July 1, 1977. Its *reductio* implication is that if a particular regulation prohibited the importation, on July 1, 1977, of Cuban cigars but not of Cuban cigarettes, an adjustment of the embargo to include cigarettes would be im-

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[27] It is further illuminating in this respect that Congress did, in IEEPA, manifest its sensitivity to First Amendment considerations by restricting the President's authority to control "any postal, telegraphic, telephonic or other personal communication, which does not involve a transfer of anything of value." 50 U.S.C. 1702(b)(1).

proper under TWEA Section 5(b), and would require the invocation of a new national emergency under IEEPA.[28]

In parts II and III of our brief we show that the court of appeals' static interpretation of the grandfather clause is inconsistent with the traditional manner in which foreign assets control programs have always operated and with Congress's intent in enacting it. At this point we therefore limit ourselves to basic propositions deriving from the language and structure of the relevant provisions.

a. The grandfather clause provides that TWEA "*authorities*" being exercised with respect to a country on July 1, 1977, may continue to be exercised. It does *not* say that the "restrictions" or "prohibitions" in effect on July 1, 1977, may be continued. The grant of the authority to impose a prohibition is not the equivalent, linguistically or conceptually, of the prohibition itself. There is no reason why, therefore, Congress should be deemed to have used the two sorts of words and concepts interchangeably. If Congress had wished to freeze existing prohibitions into place, nothing would have been easier than to state, in the grandfather clause, that only the "restrictions" in effect on July 1, 1977, could be continued under the TWEA; and that all other "restrictions" would have to be imposed pursuant to IEEPA.

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[28] Under the court of appeals' reasoning, anomalous gaps would be created in the President's grandfathered TWEA authorities quite apart from the 1977 general license. Long before that general license was adopted, specific licenses were issued under Regulation 201(b) to specific people to engage in specific property transactions with respect to Cuba. On the court of appeals' approach to the grandfather clause, the President would be deemed not to be "exercising" TWEA authority to restrict the travel-related transactions of such a person and thus could not have restricted or revoked that particular license without a new IEEPA national emergency declaration. This example, seemingly farfetched, illustrates that there is a fundamental analytical confusion in the approach of the court of appeals, an approach that assumes that the "authorities" being exercised on July 1, 1977, consisted only of the specific *prohibitions* that were in place on that date.

How easy it is to use the terms "restrictions" or "prohibitions" is symptomized by the fact that both the court of appeals and the respondents consistently paraphrase the grandfather clause by importing into it one of those words as a substitute for the word "authorities." The court of appeals referred over and over again to the question of what "restrictions" were in effect—rather than what "authorities" were being exercised—on July 1, 1977, and to the grandfathering of "on-going restrictions" (Pet. App. 11a; see also *id.* at 4a, 5a, 7a). Respondents, too, seem unable to resist the urge to substitute the terms "prohibitions" and "restrictions" for the actual language of the grandfather clause (Br. in Opp. 22, 25). But Congress did pointedly resist the temptation to use these words and adopted one that means something else and functions conceptually in a different way. The exercise of that choice should not be ignored.

To equate "authorities" with "prohibitions" also distorts the structure of TWEA Section 5(b) itself, which specifies that the President has authority to "regulate" (by means of, inter alia, "licenses")—as well as to "prevent or prohibit"—property transactions. In view of this listing in Section 5(b), the argument that only actual prohibitions can qualify as an exercise of Section 5(b) authorities (for purposes of the grandfather clause) ignores the language of the relevant statutes.

b. The structure of IEEPA itself again casts a vivid light on whether Congress envisaged foreign assets control programs as on-going *systems* subject to flexible adjustment or, rather, as a laundry-list of specific prohibitions. For it is striking that, once a IEEPA embargo has been invoked and is underway, IEEPA procedures afford the President precisely the sort of flexibility that the court of appeals thought the President was contemporaneously being stripped of in connection with grandfathered TWEA programs. Under IEEPA, once the President has declared a national emergency with respect to a particular threat, that declaration serves as the predicate for an ongoing system of regulation, and

the Executive may issue and amend regulations with respect to that threat without declaring a new national emergency. Nothing in IEEPA would prevent the President from imposing, first, an embargo on trade in machinery, and then—without a new emergency declaration—prohibiting economic transactions incident to travel. Since Congress chose not to require a new declaration of emergency in the midst of a program operating pursuant to IEEPA, it is peculiar to ascribe to it the decision to impose such a requirement in connection with grandfathered TWEA programs.

In this connection it is significant that Congress in the grandfather clause expressly created a new procedure that serves, in effect, as a substitute for new declarations of national emergency. In place of such new declarations, Congress required the President to make an explicit annual determination that continued exercise of TWEA authorities with respect to a particular country is in the national interest. In view of this required annual review, it is unlikely that Congress would also have required the declaration of a new national emergency whenever an existing program was significantly modified.

The result of the court of appeals' conclusion (Pet. App. 12a)—that Congress intended to force a President wishing to make post-July 1, 1977, changes in assets control programs to use the new IEEPA procedures—is to create an unwieldy two-track system. Some regulations involving Cuba (those addressed to purchase of Cuban machinery, sugar, or cigars) would be administered under grandfathered TWEA authority (and would be generally frozen into their July 1977 shape). Others (those addressed to purchase of Cuban tourist travel and entertainment packages) would be administered under new IEEPA authority. Under such a two-track system, the President would determine annually that it is in the national interest to continue a portion of the assets control program (that conducted pursuant to grandfathered authority); and he would declare a new na-

tional emergency and thereafter adhere to the IEEPA reporting and consultation requirements in connection with the other elements of the same program. There is no indication in either the language or structure of Public Law 95-223 that Congress contemplated or would have wished to create such a patchwork system.

II. In Enacting The Grandfather Clause Congress Acted Against A Long Tradition Of According The President Regulatory Flexibility To Adjust Foreign Assets Control Programs To Meet Changing Foreign Policy And National Security Needs

A. A natural reading of the grandfather clause to mean that Congress did preserve the President's TWEA authority to modify the Cuban Assets Control Program would be harmonious with the longstanding traditions that constituted the background against which Congress acted. Flexibility of administration has for more than four decades been a central feature of such TWEA programs, allowing the President to change the scope and form of regulations in response to shifting foreign policy and national security needs. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 673 (1981); *Nielsen* v. *Secretary of the Treasury*, 424 F.2d 833, 839-841 (D.C. Cir. 1970). Ever since 1940—when Exec. Order No. 8389 (3 C.F.R. 645) "froze" the assets of Nazi-occupied Norway and Denmark —TWEA assets control programs have assumed a consistent structure. An initial Executive Order or basic Treasury Department regulation—Regulation 201 in the case of the Cuban Assets Control Program—imposes a general prohibition on all unlicensed transactions. That prohibition—which normally tracks the language of Section 5(b) and thereby subjects to centralized regulatory supervision all transactions within the scope of the statute—remains in effect throughout the life of the program. This is then followed by a series of licenses, which are used to make specific adjustments to the general prohibition and to ease or retighten specific areas of prohibition on a short-term or long-term basis, in response to changes

in the foreign policy and national security situation. See *Propper* v. *Clark*, 337 U.S. 472, 475, 479 (1949); *Zittman* v. *McGrath*, 341 U.S. 446, 448, 464 (1951); Malloy, *Embargo Programs of the United States Treasury Department*, 20 Colum. J. Transnat'l L. 485, 496-510 (1981). The Cuban Assets Control Program has itself followed this pattern and has undergone considerable change since its institution in 1963.[29]

Because the underlying comprehensive prohibition remains in place throughout the existence of an assets control program, the President may loosen and tighten various restrictions without in any way abrogating the underlying regulatory authority to prohibit all property transactions within the scope of Section 5(b). Such a reservation of authority is essential if foreign assets control programs are to function as effective policy tools; until full normalization of relations with the subject country, the President cannot be certain that a deteriora-

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[29] The history of the Cuban Assets Control Regulations is set out at Pet. 20-21 nn.32 & 33.

The traditional manner in which foreign assets control programs operated is also illustrated by the former TWEA program for the People's Republic of China. The basic prohibition on unlicensed property transactions was instituted in 1950. See 15 Fed. Reg. 9040. The scope of the program was changed from time to time over the next 20 years by use of the licensing mechanism. See *United States* v. *Broverman*, 180 F. Supp. 631, 637 (S.D.N.Y. 1959); Sommerfield, *Treasury Regulations Affecting Trade With the Sino-Soviet Bloc and Cuba*, 19 Bus. Law. 861, 863 (1964). In 1971, as part of the general effort to improve relations between the United States and the People's Republic, the program was relaxed to permit under a general license a wide variety of previously prohibited transactions, opening the way for renewal of trade and other business relationships. See 36 Fed. Reg. 8584. Nevertheless, the People's Republic remained a "designated country" subject to the broad prohibition on unlicensed transactions found in 31 C.F.R. 500.201. Finally, in connection with the general normalizing of relations with the People's Republic, and following a claims settlement agreement entered into in May 1979, Chinese assets were unfrozen and the assets control program was ended. 45 Fed. Reg. 7224 (1980). Only then did the Executive remove the basic prohibition on unlicensed transactions involving the People's Republic.

tion in relations or the need for a new foreign policy initiative will not require a modification in or revocation of previously issued licenses. Broad reservation of authority also preserves the Treasury's jurisdiction to enforce license terms, act against license violations, and generally monitor licensed activity.

This Court has long recognized that the success of foreign assets control programs requires broad Executive authority and administrative flexibility to adjust the program as the diplomatic and national security situation changes. Thus, in cases involving World War II TWEA programs—programs that regulated the right of persons subject to United States jurisdiction to engage in a broad range of property transactions (in part by freezing and vesting of assets)—this Court, in upholding the Executive's actions, interpreted the statute as indicating a "congressional purpose to put control of foreign assets in the hands of the President * * *, so that there might be a unified national policy in the administration of the Act." *Propper* v. *Clark*, 337 U.S. at 493. See also *Dames & Moore* v. *Regan*, 453 U.S. at 673; *Zittman* v. *McGrath*, 341 U.S. at 448, 463-464; *Lyon* v. *Singer*, 339 U.S. 841 (1950). It is in view of that broad purpose that the Court has always construed TWEA authority as providing the Executive with great flexibility. See *Orvis* v. *Brownell*, 345 U.S. at 187-188; *Guessefeldt* v. *McGrath*, 342 U.S. 308, 319 (1952); *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 488-489 (1947); see also *Sardino* v. *Federal Reserve Bank*, 361 F.2d 106, 110 (2d Cir.), cert. denied, 385 U.S. 898 (1966). As the Court noted in *Dames & Moore* v. *Regan*, 453 U.S. at 672, the legislative history of the TWEA and the cases interpreting it "fully sustain the broad authority of the Executive when acting under this congressional grant of power." [30]

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[30] The Iranian assets control program, which operates under the authority of IEEPA, illustrates the sorts of adjustments that may be necessary under such a program. In the early stages of the

As we show in Section III, the legislative history indicates that Congress was well aware of the flexible manner in which foreign assets control programs are administered. But even if there were no such direct evidence, it is implausible to assume that Congress acted in ignorance of this consistent and long-maintained tradition of flexibility and regulatory adjustment (see *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978)) and for the first time took steps to prevent the Executive from meeting changing policy needs through adjustments to such a program. See *Haig* v. *Agee*, 453 U.S. 280, 297-298 (1981); *Lorillard* v. *Pons*, 434 U.S. at 580-581; *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 366 (1951).[31]

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program, soon after seizure of the hostages at the United States embassy, the President used his emergency economic powers to block Iranian assets. Thereafter, the program was modified so that parties with claims against Iranian entities were permitted under a general license to apply for court-ordered attachments of Iranian property. Then, in connection with the signing of the agreements that led to the freeing of the hostages, the President revoked the general license, with the result that the court-ordered attachments that had been obtained pursuant to that license were rendered invalid. See *Dames & Moore* v. *Regan*, *supra*.

[31] It will not do to suggest that the grandfather clause permits relaxation of restrictions on transactions, but does not allow tightening of an embargo without the declaration of a new national emergency. The broad TWEA authorities that are preserved under the grandfather clause should not operate on a one-way ratchet. If Congress intended to give the President the flexibility to relax the embargo when United States foreign policy calls for such relaxation, it must also have intended that he be able to impose restrictions if he determines that such a step would further foreign policy interests.

Even if Congress had anticipated only relaxation of the Cuban embargo, it presumably would not have excluded the ability to tighten the embargo from the scope of grandfathered authority. In generally relaxing an embargo, the President might wish to tighten some regulations while he relaxed others, in order to maintain what he viewed as the proper mix of foreign policy measures. It would be anomalous to require declaration of a national emergency in connection with such an adjustment.

B. Construction of the grandfather clause to preserve the Executive's traditional flexibility in the administration of ongoing foreign assets control programs is particularly appropriate because of the significance of those programs for the foreign policy and national security interests of the United States. As this Court has recognized, the President needs maximum flexibility in the areas of foreign policy and national security; it is therefore traditional for Congress to delegate broad authority in those areas. See *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982); *Dames & Moore* v. *Regan*, 453 U.S. at 678-679; *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-322, 324 (1936); *Mackenzie* v. *Hare*, 239 U.S. 299, 311 (1915). See also *E.W. Bliss Co.* v. *United States*, 248 U.S. 37, 46 (1918); *Curran* v. *Laird*, 420 F.2d 122, 128 (D.C. Cir. 1969).

The regulation at issue here presents a perfect illustration of the manner in which steps taken under an assets control program can serve the changing needs of United States foreign policy. Following the 1977 liberalization with respect to travel-related property transactions, there was a deterioration in relations between the United States and Cuba. Beginning in 1978, Cuba increased its military involvement in various countries in an effort to destabilize governments friendly to the United States. See J.A. 109, 113-114. In late 1981 the United States learned that Cuba was engaged in plans significantly to expand its tourist industry.[32] The 1982 retightening of restrictions on travel-related transactions constituted a response to these developments and served a dual foreign policy purpose. It operated as a means—short of force—of expressing the United States' serious disapproval of

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[32] See Enders Declaration ¶¶ 8-9 (J.A. 173-175); Michel Declaration ¶ 6 (J.A. 180). See Pet. 8-9 n.15 for a description of actions Cuba was taking to build its tourist industry in this period.

Cuba's adventuristic policies;[33] in addition, it "reduce[d] Cuba's hard currency earnings from travel by U.S. persons to and within Cuba" (47 Fed. Reg. 17030 (1982)), thus decreasing the ability of the Cuban Government to generate resources to finance policies detrimental to United States interests.[34]

The court of appeals' opinion reflects little awareness of the administrative flexibility that has been a consistent hallmark of TWEA assets control programs. And its reading of the grandfather clause as not authorizing modification of grandfathered programs seriously undermines the efficacy of those programs as instruments of foreign policy.[35]

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[33] Michel Declaration ¶¶ 3-8 (J.A. 178-181); Frechette Declaration ¶ 5 (J.A. 107).

[34] Reestablishment of a vigorous tourism industry could provide Cuba with a significant source of hard currency to further its foreign policy goals. In 1958, Cuba earned $37 million from United States travelers alone—two percent of its gross national product and almost four percent of foreign exchange earnings (Enders Declaration ¶ 10, J.A. 175). United States government estimates indicated that if Cuba could return tourism to its 1958 prominence as a source of foreign exchange, within a few years it would earn a net hard currency income of approximately $190 to $225 million per year, which would amount to 20% of Cuba's annual hard currency income under present conditions (June 3, 1983, Walker Declaration ¶ 4, J.A. 159).

[35] The 1982 regulation continues to permit economic transactions in connection with certain types of travel the United States wishes to encourage on First Amendment and humanitarian grounds. For example, the regulation retains a general license authorizing travel-related property transactions by members of the press and by individuals with close family members in Cuba. By permitting these transactions, the United States provides incentives to the Cuban Government to conduct its affairs in an internationally acceptable manner. See Michel Declaration ¶ 6 (J.A. 180).

In their brief in opposition (at 36) respondents attribute significance to the fact that the Cuban Assets Control Regulations permit trade between Cuba and foreign-based subsidiaries of United States corporations (see 31 C.F.R. 515.559) and that such trade results in economic benefit to Cuba. But different sorts of foreign policy con-

The court of appeals suggested that it was not interfering with the ability of the Executive to take "whatever steps [are] necessary to conduct our affairs with Cuba" (Pet. App. 12a) because the President may use IEEPA procedures to institute such measures. But the suggestion is far too casual. Action under IEEPA requires the President to declare a new national emergency based on a finding that Cuba presents an "unusual and extraordinary threat" to the "national security, foreign policy, or economy" of the United States. 50 U.S.C. 1701. That is a step with obvious and momentous foreign policy implications. See Michel Declaration ¶ 9 (J.A. 181-182). The declaration of a national emergency and the finding of an "unusual and extraordinary threat" may be warranted in order to institute a new assets control program. But it is a wholly different question whether the President should take such a step—one that could significantly heighten tensions—in order to make an adjustment to or a modification in an existing program. To *require* that such a step be taken whenever the President wishes to tighten in any respect the embargoes as they stood with respect to Cuba, North Korea, Vietnam and Cambodia on July 1, 1977, is to introduce a dangerous and unnecessary rigidity into the conduct of our foreign policy.

C. The Treasury Department has consistently interpreted the grandfather clause as authorizing modification of assets control programs in existence on July 1, 1977,

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siderations underlie that aspect of the regulations. In a number of cases, host countries insist that subsidiaries of United States companies are nationals of the host country and must be permitted to trade with Cuba if the host country permits such trade. Therefore, the Treasury Department regulations authorize such trade (under strict conditions) in order to avoid foreign relations difficulties with those countries. Affidavit of Dennis M. O'Connell, Director, Office of Foreign Assets Control ¶¶ 13-14 (J.A. 125-126). In any event, since the result of trade between Cuba and foreign-based subsidiaries of United States companies is a net outflow of hard currency from Cuba, respondents' point is a hollow one. See O'Connell Affidavit ¶ 15 (J.A. 126).

thereby preserving the flexibility necessary to the continuing effectiveness of those programs. Accordingly, the Department has continued to modify grandfathered programs.[36] That construction of the statute by the agency charged with its administration is entitled to deference. See, *e.g.*, *Blum* v. *Bacon*, 457 U.S. 132, 141 (1982); *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 31-32 (1981); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450-451 (1978); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).[37]

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[36] Post-1977 modifications to the Cuban Assets Control Regulations are described at Pet. 20-21 n.33. In *United States* v. *Frade*, 709 F.2d 1387, 1397-1403 (1983), the Eleventh Circuit concluded that one of these post-1977 modifications—31 C.F.R. 515.415, the Mariel boatlift regulation—was not authorized by the grandfather clause, citing the decision of the court of appeals in this case. The court in *Frade* did not have the benefit of full briefing or argument on the grandfather clause issue, since the decision of the court of appeals in this case was issued after oral argument in *Frade*.

The United States did not seek certiorari in *Frade*, because the court of appeals rested its reversal of the convictions in that case on two independent grounds: (i) insufficient evidence to show what the court viewed as the requisite level of specific intent, as well as (ii) the invalidity of the boatlift regulation. The Solicitor General determined that the holding with respect to evidence of specific intent was not sufficiently important to warrant seeking review by this Court.

[37] Deference to agency interpretation is particularly appropriate in a case like this one, in which representatives of the Executive Branch were intimately involved in the drafting of the statute. As we explain in Section III, representatives of several federal agencies attended the mark-up sessions and worked closely with the subcommittee staff in the drafting of the legislation, including the development and revision of the grandfather clause. In these circumstances, the Treasury Department, which took the lead in representing the Administration viewpoint before the subcommittee, is in a particularly good position to know what Congress intended when it enacted the grandfather clause.

III. The Legislative History Of The Grandfather Clause Shows That Congress Intended To Preserve The President's Authority Under TWEA To Regulate Travel-Related Economic Transactions Involving Cuba

The legislative history of Public Law 95-223 shows that it was one of the overarching purposes of the statute to preserve the President's authority to conduct the Cuban Assets Control Program under TWEA Section 5(b) without the invocation of a new national emergency. That history further indicates that Congress understood that what was involved was an embargo *program* subject to adjustments, not a subject-specific list of particular prohibitions to be frozen into place as of July 1, 1977. Finally, nothing in the legislative history supports the conclusion that Congress contemplated that the authority to regulate travel-related economic transactions falls outside the scope of the Cuban embargo program and comprises a separate and distinct category of authority.

We note at the outset that the legislative history is complicated, variegated, and, on occasion, obscure and contradictory. Public Law 95-223 was the product of four years of legislative attention to the controversial issue of presidential "emergency" powers. Resolution of countervailing interests and policies was achieved in large part through negotiations among Congress, congressional staff, and the Executive Branch. Points of resolution between competing policy thrusts emerged at various times, only to be reformulated later in the process. Much of the legislative history consists of subcommittee sessions characterized by numerous informal exchanges among subcommittee members, subcommittee staff and Executive Branch witnesses. Throughout, different people used different, sometimes imprecise, words ("authorities", "powers", "actions", etc.) to refer to subtle concepts. In such a setting it is particularly dangerous to take out of context individual exchanges or formulations that were part of the ongoing process of negotiation and drafting. Instead, the legislative history must be understood in terms of its dominant movement and fundamental purposes.

A. Public Law 95-223 grew out of a congressional review of presidential use of emergency powers commenced in 1973. See S. Rep. 94-1168, 94th Cong., 2d Sess. 8-9 (1976); H.R. Rep. 95-459, 95th Cong., 1st Sess. 6-7 (1977). In initiating that review Senator Church pointed out that the United States had been in a state of emergency continuously since President Roosevelt declared the banking emergency of 1933. *National Emergency: Hearings Before the Senate Special Comm. on the Termination of the National Emergency, Part I*, 93d Cong., 1st Sess. 2 (1973). The Special Committee established to conduct the inquiry discovered that no fewer than four national emergency proclamations were then extant. The most significant of these was President Truman's 1950 Korean war emergency proclamation, which served as the basis for the embargoes against North Korea, Cuba, Vietnam, and Cambodia. S. Rep. 94-1168, *supra*, at 9. The Committee eventually identified over 450 statutes giving the President various emergency powers. S. Rep. 93-549, 93d Cong., 1st Sess. 7 (1973).

Congress was understandably concerned that the currency had become cheapened in the area of emergency powers and that the superannuated states of emergency that remained in effect gave the President too much discretion in the use of such powers. As a partial solution to this problem, Congress enacted the National Emergencies Act of 1976, 50 U.S.C. 1601 *et seq.* (see page 5 *supra*). The Executive Branch supported this legislation. But it was also greatly concerned about the effect of the legislation on then-existing uses of the President's TWEA powers—uses that were in no way superannuated. There were strong recommendations from representatives of the Treasury and State Departments that the new legislation should not disturb the then-existing freeze on Chinese assets and the embargoes against Cuba, Vietnam, Cambodia and North Korea. *National Emergencies Act: Hearings on H.R. 3884 Before the Sub-*

comm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 38, 41, 45, 47, 81-82 (1975). In response to this concern, Congress exempted Section 5(b) of the TWEA from the 1976 National Emergencies Act, see 50 U.S.C. 1651(a)(1), providing instead for further study of appropriate revisions to Section 5(b). 50 U.S.C. 1651(b); see H.R. Rep. 95-459, 95th Cong., 1st Sess. 6-7 (1977); page 5, *supra*.

During the spring of 1977, the responsible subcommittee of the House Committee on International Relations held hearings and mark-up sessions to consider the legislation necessary to reform Section 5(b). *Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. (1977) (hereinafter cited as *Hearings*). The objective was to resolve the problem left open by the National Emergencies Act—what (if any) changes should be made in the President's authority under Section 5(b) to exercise emergency economic powers? The subcommittee's solution to this problem reflected two dominant purposes. Congress wanted to limit the President's authority to exercise peacetime emergency economic powers by giving Congress a greater voice in the exercise of these powers. The proposed legislation therefore limited the use of TWEA Section 5(b) authorities to times of war, and (in IEEPA) spelled out new predicates and procedures for the use of economic powers in connection with future national emergencies in times of peace.

At the same time—and equally important—the subcommittee designed the legislation to make sure there would not be interruption of or interference with the President's powers to continue existing embargo programs that were then being conducted on the basis of past declarations of emergency. (Indeed, Chairman Bingham acknowledged that the Administration's consent could never be obtained if Congress attempted to end the existing

programs: "This is essentially an act trying to clear up the mess that the [TWEA] has left us in. We can always move on the front of Vietnam or Cuba * * * However, to get this through in reasonably good form, we would like not to raise that particular controversy." *Hearings* 210.) Congress recognized that the use of IEEPA procedures—in particular, the need to declare a *new* national emergency based on a *new* finding of an "unusual and extraordinary threat" to the security or foreign policy or economy of the United States—might be inappropriate and awkward in the context of ongoing embargo programs covering countries such as Cuba and Vietnam, and might embarrass and complicate our difficult and sensitive relations with these countries.

The accommodation of these two dominant purposes provides the overarching point-counterpoint of the legislative history. IEEPA procedures were to apply to *future* crises and *future* emergencies; they were not to apply to ongoing programs already initiated under previously declared emergencies. The House Report states: "The purpose of the legislation is to redefine the power of the President to regulate international economic transactions in *future* times of war or national emergency." H.R. Rep. 95-459, *supra*, at 1 (emphasis added). See also *id.* at 13 ("Title II of the bill confers upon the President authority to exercise controls on international economic transactions during future national emergencies"); 123 Cong. Rec. 22475 (1977) (IEEPA "confers upon the President a new set of authorities for use in time of future national emergency") (statement of Representative Bingham).[38] At the same time, the grand-

[38] See also 13 Weekly Comp. Pres. Doc. 1940, 1941 (Dec. 28, 1977) (statement of President Carter that the new legislation "places additional constraints on use of the President's emergency economic powers in future national emergencies").

There are in the legislative history some references to use of IEEPA procedures for any "future action." But it seems clear when the context is considered that such references were not meant to apply to adjustments to the controls imposed with respect to

father clause was incorporated in the legislation to assure that ongoing assets control programs could continue without the need to declare a new national emergency.

B. The concern that new and awkward constraints should not be applied to existing assets control programs—particularly the Cuban program—was raised at an early stage of the legislative process. Professor Andreas Lowenfeld was the first witness at the hearings on Public Law 95-223. He pointed out that it would be an "awkward act * * * perhaps even an inappropriate interference in negotiations being carried out by the executive branch" if the Cuban embargo program were suddenly ended by a repeal of Section 5(b). *Hearings* 10. Professor Lowenfeld went on to point out the difficulties that would result from requiring a new declaration of national emergency in the midst of a program: "Coming again to the Cuban situation, * * * I could imagine that the President might well not be anxious at a given point to proclaim anew a state of emergency even as he was negotiating for relaxation of tensions." *Ibid.*

Administration witnesses also stressed that the President should not be required to declare a new emergency with respect to Cuba. Leonard Santos of the Department of the Treasury explained the reluctance of the Executive

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countries like Cuba and Vietnam. For example, when the House subcommittee staff director asked for the Administration's understanding of the extent to which IEEPA procedures would be used in connection with a new emergency problem, Leonard Santos of the Treasury Department responded by distinguishing between such "future actions" and any new measures concerning Cuba or Vietnam:

> My understanding is that if section 5(b), or the International Economic Emergencies Act is used as a basis for future action, it would have to conform to the procedural restraints of that act.
>
> If the President claims that he must do something new with respect to Cuba, or new with respect to Vietnam, that, of course, is automatic.

Hearings 211.

to consider declaring a new national emergency in connection with existing programs: "But if a new national emergency had to be declared [with respect to existing uses of Section 5(b)] under all the constraints that have been placed in this staff draft, I am not certain that a new national emergency would be declared." *Hearings* 182. Santos went on to note that "it is difficult, considering our present state of negotiations with Cuba and other countries that the President would want to declare a national emergency with respect to those countries." *Id.* at 190. See also *id.* at 191, 193-194.

Those who were drafting the new legislation were sympathetic to the Executive's concerns. Chairman Bingham said: "I can see the problem. I personally would not argue that we should ask or expect the President to declare, for the first time, an emergency with respect to Cuba." *Hearings* 190. The subcommittee thus proceeded to draft a new version of the grandfather clause, one that Mr. Bingham characterized as a "reasonably satisfactory" response to the Administration's objections. *Id.* at 209. He noted (*id.* at 207) that the subcommittee had decided that there should be grandfathering of "those situations where [TWEA] authorities are currently being exercised under the old Trading With the Enemy Act—and I might mention that the principal ones are Vietnam, Cuba, and North Korea, and the freezing of assets of a number of Communist countries * * *," and that "[w]e have recognized that it might be embarrassing for the President to have to declare new national emergencies with respect to Cuba and Vietnam." The subcommittee staff director, R. Roger Majak, stated: "The prospect of the president having to declare a new emergency with respect to some of these existing uses, such as Cuba, * * * does pose a diplomatic, or potential diplomatic problem." *Id.* at 209.

The one point that stands out clearly from these comments is that Congress was persuaded not to require the President to declare a new national emergency in order

to continue the existing embargo program with respect to Cuba.

C. The further question that remains is whether the existing embargo with respect to Cuba was perceived as a specific list of specific prohibitions, or, rather, as a program or system of restrictions subject to periodic adjustment. The court of appeals supported its conclusion that only restrictions actually on the books on July 1, 1977, were grandfathered by pointing out that there were references in the legislative history to grandfathering "existing uses" of TWEA authorities (see Pet. App. 7a-9a).[39] But, for every invocation of the word "uses," we can cite a countervailing example where the reference was to grandfathering an existing "embargo" or "program." For example, during the hearings Representative Bingham stressed that it was not the intention of the subcommittee to interfere with the continuation of "the current embargo against North Korea, Vietnam, and Cuba" and that "it is the intention of this subcommittee, the consensus so far, that we want to grandfather in and not disturb the embargoes against Cuba, against North Vietnam, and against North Korea." *Hearings* 188, 193. The House report described the uses of Section 5(b) authorities that were to be grandfathered as including "the total U.S. trade embargoes of Cuba and Vietnam." H.R. Rep. 95-459, *supra*, at 9-10. During consideration by the full House, Representative Bingham described the grandfather clause as allowing the continuation in effect, at the President's discretion, of "trade embargoes and asset control programs currently applied by the United States under the authority of sec-

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[39] As previously pointed out (see pages 18-30, *supra*), it is our position that the authority to regulate travel-related economic transactions *was* being "used" (exercised) on July 1, 1977, through the comprehensive prohibition asserted by Regulation 201(b) combined with the revocable 1977 general license. The word "uses" seems simply a shorthand for the term "authorities * * * being exercised." *What* authorities were being exercised is not in any way indicated or specified by the word "uses."

tion 5(b)." 123 Cong. Rec. 22475 (1977). Later he stated that "this legislation specifically grandfathers the embargoes against Vietnam, Cambodia, Laos, Cuba, and other existing embargoes, so that *they are not affected in any way by this legislation.*" 123 Cong. Rec. 38166 (1977) (emphasis added). The Senate report states: "Section 101(b) would enable the President to continue to control transactions with certain countries (Cuba and Vietnam, for example) * * *." S. Rep. 95-466, 95th Cong., 1st Sess. 4 (1977). On signing the legislation, President Carter stated that it would not affect "embargoes now being exercised against certain countries." 13 Weekly Comp. Pres. Doc. 1940, 1941 (Dec. 28, 1977).[40]

There is no indication in the legislative history that Congress believed that the "embargoes" and "programs" to which it was referring amounted to static sets of regulations. In fact, Congress was aware that embargoes are adjusted over time to meet changing foreign policy needs. Julius Katz, Assistant Secretary of State, advised the House subcommittee that the Section 5(b) controls "currently being exercised are reviewed on a continuing basis in the context of our developing relationships with the targeted countries" and that our relations with Cuba were "still unsettled." *Hearings* 98, 117.[41]

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[40] References in the legislative history to "embargoes" or "trade embargoes" appear to be shorthand for programs of assets controls. Contrary to respondents' suggestion (Br. in Opp. 22-23), there is no indication in the legislative history that references to an "embargo" were intended to encompass only restrictions on trade in commodities such as Cuban sugar, as opposed to the full range of existing controls on all types of property transactions specified in Section 5(b)(1)(B). In fact, some of the references were to "trade and financial embargoes." See *Hearings* 103 (statement of Assistant Secretary Bergsten).

[41] See also *Hearings* 147 (remarks of subcommittee staff director Majak) (referring to the need for grandfathering to avoid interference with "ongoing uses of [Section 5(b)]"); *id.* at 197-198 (remarks of Leonard Santos).

It is also striking that there is virtually no reference in the legislative history to the subject-matter content of the regulations on the books as of July 1, 1977—as there presumably would have been if Congress's intent was simply to grandfather specific prohibitions.[42] Rather, whenever *categories* of 5(b) authorities were being discussed, the reference was to the broad classes of regulation specified by Section 5(b) itself. Thus, Mr. Majak stated:

> The current uses which the staff draft grandfathers on page 4, paragraph (e), are the uses of 5(b) *transaction controls* to implement our current trade embargoes against Vietnam, Cuba, North Korea, and to *control foreign assets* in certain places like the People's Republic of China, Czechoslovakia, and others, with which we have not settled certain financial claims.
>
> The staff draft would make no change in the status of those claims, or any of the authorities currently exercised under 5(b). It would permit them to continue to be used as long as the President determines it is necessary to do so.

Hearings 147-148 (emphasis added). See also *id.* at 167 ("assets" controls vs. "currency" controls); and see *id.* at 100, 107-108, 144-145, 147, 152, 207, 215.

Even more striking, there is not the slightest indication that Congress had any intention of singling out travel-related economic transactions as a special and distinct subject, to be regulated under new IEEPA procedures as opposed to grandfathered TWEA procedures. Indeed, the only mentions of travel-related economic

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[42] To the extent Members of Congress focused on the content of the regulations, they were referred to a 1976 version of the Cuban Assets Control Regulations. See *Hearings* 168; Staff of the Subcomm. on International Trade and Commerce of the House Comm. on International Relations, 94th Cong., 2d Sess., *Trading With the Enemy: Legislative and Executive Documents Concerning Regulation of International Transactions in Time of Declared National Emergency* 640 (Comm. Print 1976).

transactions indicate that Congress was apprised that such transactions *were* subject to regulation under TWEA Section 5(b) authorities. For instance, when Mr. Majak, the subcommittee staff director, noted that "there are other authorities being exercised with respect to Cuba and Vietnam," Representative Findley asked Mr. Santos: "Would you list those?" Mr. Santos replied:

> They are essentially transaction control regulations to the extent that the transaction involves a transfer of assets, it would involve the travel to those countries and the exchange of goods. Those are powers being exercised under 5(b), and this is considerably more extensive than the freezing of a bank account or a piece of property.

Hearings 215.[43]

D. In support of its view that Congress intended to grandfather only restrictions that were actually on the books as of July 1, 1977, the court of appeals relied heavily on the fact that the subcommittee deleted from an early version of the grandfather clause language stating that "any other authority conferred upon the President by [Section 5(b)] may be exercised to deal with the same set of circumstances," and Representative Bingham's statements about that deletion. See Pet. App. 9a-10a. We reprint in the margin the entire exchange referred to by the court of appeals.[44] Representative Bing-

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[43] In addition, Mr. Majak mentioned that the news media "in the case of Cuba objected to the fact that they are subjected to a licensing process in order to travel to certain embargoed countries" and that "[t]hat was certainly a part of the exercise of the authorities" (*Hearings* 197).

[44] MR. BINGHAM. I have a question, and perhaps we could spend a few minutes on this before we go on. I do have a question as to whether subparagraph (2) on page 2 is desirable. Would you explain that, and indicate the reason for that?

MR. MAJAK. Our reading of that would be that with respect to any uses of 5(b) authorities for any presently existing situation, not only could the President use those particular au-

ham's remarks, even on their face, show at most that at this stage of the hearings he was concerned that the exercise of one broad category of Section 5(b) authority ("assets controls") not be usable as a predicate for the exercise of a different broad category of 5(b) authority ("currency controls"). Thus, the deletion cannot be taken to indicate that Congress intended to freeze into place specific subcategories of assets prohibitions on the books on July 1, 1977.

Even more important, at the hearings on the following day Mr. Santos of the Treasury Department, responding to the invitation to provide the "administration's reaction," testified that the issue was in effect moot because the President was in fact exercising all of the authorities provided by Section 5(b):

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thorities that he is now using, but any others which are conferred by section 5(b).

So, if the President is presently using asset controls toward a particular country, but is not using, let us say, currency controls, he nonetheless could use, at some later date if he so desired, currency controls with respect to that situation.

MR. BINGHAM. I have a serious question about that. It seems to me that if the President has not up to now used some authority that he has under section 5(b) in connection with those cases where 5(b) has been applied, I don't know why it should be necessary to give him authority to expand what has already been done. It is really going beyond grandfathering.

It seems to me that grandfathering applies to what has been done to date, and that should be ample authority. I think on this point we would be particularly anxious to have the administration's reaction.

MR. MAJAK. If I may perhaps state it another way, I think it boils down to a question of whether we are grandfathering a particular situation, and all the powers that may be necessary to deal with the situation, or whether we are grandfathering the particular authorities themselves and their usage.

MR. BINGHAM. In those situations?

MR. MAJAK. Yes.

Hearings 167.

> Mr. Cavanaugh, I believe, asked whether or not there were powers—you also asked if there were not powers now not exercised under 5(b), that we might wish to exercise pursuant to existing circumstances, existing embargoes.
>
> We have reviewed the powers conferred under this draft. Frankly we believe that all the powers conferred are exercised and that there are no additional powers that could be exercised that are not already exercised.

Hearings 188. Congressman Bingham understood this point, commenting immediately thereafter:

> You have said, as I understand it, that there is no need for subparagraph 2, that you would not be disturbed by the elimination of paragraph 2.

Ibid. And Mr. Bingham emphasized that "we are aiming at the same objectives" (*id.* at 189). In other words, on reflection, all parties agreed that the language at issue was surplusage and thus unnecessary.

At the very next meeting of the subcommittee, Mr. Bingham summarized the subcommittee's accommodation of the Administration's views as follows:

> For the benefit of some of the members who have not been able to be present at the previous sessions of the subcommittee on this bill, let me attempt to summarize the working draft that we have been working on.
>
> SUMMARY OF STAFF DRAFT
>
> First of all, title 1 limits the existing Trading with the Enemy Act to situations where there is a declared war, that is for the future. With regard to those situations where these authorities are currently being exercised under the old Trading With the Enemy Act—and I might mention that the principal ones are Vietnam, Cuba, and North Korea, and the freezing of assets of a number of Communist countries, including China as well as a number of Eastern European countries—the tentative judgment

of the subcommittee has been that these, in effect, should be grandfathered, subject only to a requirement that as of September of next year, which is the time at which the other emergencies that are covered by the National Emergencies Act expire, the President would simply have to indicate that certain powers which he has been exercising under the Trading with the Enemy Act are to be continued in the national interest. This is the latest of several versions that we have discussed.

We have recognized that it might be embarrassing for the President to have to declare new national emergencies with respect to Cuba and Vietnam. At the same time, if we were to take action here, in effect, terminating those embargoes, we know that this bill, which we hope will not be particularly controversial, would become instantly controversial.

So we have arrived at this proposed compromise, which I hope will be satisfactory to the administration. We would not require the President to declare that the emergency of 1950, under which those powers are now being exercised, continues; we would simply require him to state, beginning in September 1978 and annually thereafter, that such powers are continued in the national interest.

Hearings 207-208.

The history of these exchanges thus illustrates, again, the dangers of quoting out of context narrow passages from the legislative history. Nothing in the deletion of the subparagraph (2) language, we submit, supports the proposition that Congress intended to freeze into place the specific list of goods and services that happened to be the subjects of a prohibition on July 1, 1977.[45]

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[45] There are, of course, some indications in the legislative history that Congress did not wish the grandfather clause to be read in an overly expansive manner. In particular, Representative Cavanaugh —an *opponent* of grandfathering—sought, and obtained, confirmation of the Administration's understanding that the grandfather clause would "preclude the expansion by the President of the au-

As we noted at the outset of this section, the legislative history reflects both Congress's wish to limit the President's use of emergency economic powers and its desire to preserve authority in connection with existing Section 5(b) programs. In the course of many days of hearings, some remarks were made that could be read to support the court of appeals' reading of the grandfather clause.[46] Occasionally the discussions during the

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thorities that might be included in 5(b) but are not being employed as of June 1, 1977." Staff of House Comm. on International Relations, 95th Cong., 1st Sess., *Markup on Revision of Trading With the Enemy Act* 21 (Comm. Print 1977). But the quoted language is quite consistent with the concern, simply, that the President might use the grandfather clause to extend the exercise of Section 5(b) powers to new countries. During the House subcommittee hearings several subcommittee members had suggested that the grandfather clause might be read to permit such an extension to different countries. See, *e.g.*, *Hearings* 211 (remarks of Rep. Ireland) ("Let us say Cuba is grandfathered in under that * * * could that grandfathered authority be broadened out from—Cubans have troops in Angola"); *id.* at 211-212 (remarks of Rep. Findley) ("would those grandfathered ones then be spread out to cover just a tremendous wide spectrum? The Vietnam one could end up covering all of Southeast Asia"). In light of these suggestions, Representative Cavanaugh may have only been seeking a commitment from the Administration not to extend the grandfathered authority to countries not previously covered by Section 5(b) controls.

Even if Representative Cavanaugh was speaking more narrowly, there is no indication that he wished to make distinctions within subcategories of property transactions, rather than between broad categories of Section 5(b) authorities as these are specified in Section 5(b) itself. As already shown, to the extent there is any discussion in the legislative history of distinction among authorities, the categories mentioned were broad.

[46] For example, at one point during the House subcommittee hearings, Representative Bingham stated that the subcommittee had "no intention of grandfathering additional acts that may be taken in the next few weeks." *Hearings* 211. It is unclear whether Representative Bingham was referring to acts with respect to a country not then covered by an assets control program or to any new acts. In any event, his statement must be evaluated in the context of his other comments, in which he indicated that the Cuban

hearings reflect more confusion than any affirmative indication of legislative intent;[47] and, as we have noted, the terms used were sometimes imprecise. But the dominant thrust of the legislative history demonstrates Congress's desire to accommodate the Executive's concern that authority in connection with ongoing assets control *programs*—particularly the Cuban program—be preserved to avoid placing the President in the position of having to declare a new national emergency with respect to Cuba; and to prescribe IEEPA procedures for use only in the case of future emergencies.

IV. The Regulation At Issue Is Not Excluded From Grandfathered TWEA Authority On The Ground That It Has An Incidental Effect On Travel

A. The court of appeals concluded (Pet. App. 11a-12a) that its construction of the grandfather clause was supported by this Court's opinion in *Kent* v. *Dulles*, 357 U.S. 116 (1958), in which the Court said (*id.* at 129) that the courts should "construe narrowly all delegated powers that curtail or dilute" the right to travel.

Kent involved a total prohibition on Kent's right to leave the country, based on his alleged pro-Communist activities. The prohibition was exercised by virtue of a highly general statutory authority delegating to the Secretary of State the power to "grant and issue passports." The Court concluded that the right to travel is a Fifth Amendment liberty that must be regulated, if at all, pursuant to the lawmaking power of Congress itself; that if the power to regulate is delegated, it must be under adequate standards; and that Congress had not spoken with a clarity adequate to justify the proscription against Kent.

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embargo program would be preserved and that the President would not be required to declare a new national emergency with respect to Cuba.

[47] See, *e.g.*, the inconclusive colloquy between Representative Bingham and Leonard Santos of the Treasury Department at *Hearings* 211-212.

In our view, the principle of statutory construction invoked in *Kent* v. *Dulles* has no application to this case.

1. *Kent*—like *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964), also cited by the court of appeals—involved a direct and purposeful prohibition on the right to travel. Neither the TWEA, nor the grandfather clause, nor the regulation at issue in this case, regulates travel as such. They are addressed entirely to economic transactions involving the transfer of money or other economic benefits to Cuba. Their purpose is not to restrict the freedom of American citizens but to deny hard currency to a country that for two decades has specialized in the enterprise of opposing and subverting the foreign policy and security interests of the United States and its allies. This Court has never held—and, we submit, should not today hold—that the "narrow construction" rule of *Kent* should apply indiscriminately to all economic regulation that has the incidental effect of making it harder for a person to go to a particular country. Indeed, we believe that this Court's opinion in *Haig* v. *Agee*, 453 U.S. 280, 304-306, 309 (1981), forecloses application of the *Kent* analysis to the type of regulation at issue here. And see *Califano* v. *Aznavorian*, 439 U.S. 170, 177 (1978).

Applying the *Kent* rule of strict construction would be particularly inapposite when the regulation at issue constitutes one component of an elaborate regulatory mosaic. Neither Section 5(b), nor the grandfather clause, nor Regulation 201(b) mentions or distinguishes travel-related transactions. Each deals with a *system* of economic controls to be invoked against those countries—and only those countries—with which our relations are such as to warrant the imposition of a peacetime program of extensive economic sanctions. To superimpose a special rule of statutory construction onto one small part of such a regulatory system just because that part has an impact on some people's travel plans would unduly constrain Congress's power to deal systematically and comprehensively with our economic relations with those

countries for which commercial and financial relations are embargoed.

2. *Kent* v. *Dulles* is irrelevant to this case for another reason. The issue in *Kent* was whether Congress did or did not intend to prohibit Kent's travel. The Court held that, in the absence of a clear statement, it would assume that Congress did not. Here, the court of appeals conceded that Congress did delegate to the President the power to prohibit travel-related economic transactions. All it held was that, as of 1977, any such restriction must be imposed under IEEPA rather than under the TWEA. But we think that *Kent*'s constitutionally based clear-statement rule of construction is not an appropriate tool for determining whether the President should regulate by using one statutory procedure or another—particularly where the two statutes are equally silent about the authority so to regulate. On the court of appeals' own reasoning, all that Congress was deciding in 1977 was whether the pre-existing power to regulate economic transactions incident to travel should be shifted from one statutory "track" to another. The solution to that question is not aided or affected by the fact that such regulation has an incidental impact on the constitutional liberty to travel.[48]

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[48] The court of appeals (Pet. App. 12a) followed its reliance on *Kent* with a citation to Justice Jackson's opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635-638 (1952). And in their brief in opposition (at 20, 34), respondents chide us for failing to cite the portion of *Youngstown* in which Justice Jackson explained that the highest level of scrutiny is appropriate in cases in which the President takes measures incompatible with the express or implied will of Congress. In our view, *Youngstown* is simply irrelevant to this case. In *Youngstown* the government argued that the Executive has the "inherent" power to act, and to do so in disregard of concededly applicable statutory alternatives. In this case the government is making no claim that the Executive has "inherent" power to disregard IEEPA procedures and impose nonstatutory restrictions on travel-related property transactions with Cuba. It claims only that its regulations were issued in *compliance* with the procedures required by the relevant and applicable statute: the TWEA as grandfathered by Public Law 95-223.

3. Seven years after *Kent* this Court decided *Zemel* v. *Rusk*, 381 U.S. 1 (1965). In *Zemel* the Executive used the same general passport authority involved in *Kent*; but the prohibition encompassed only travel to Cuba. The Court held that the very same delegation of authority that was insufficient to justify a general ban on travel was sufficient to support a specific ban on travel to a particular country. In effect the holding was that *Kent*'s rule of "clear statement" did not apply—at least in full force—to *area* restrictions, which had a lesser impact on the liberty to travel, a stronger basis in administrative practice, and a more specific justification in foreign policy needs. See also *Haig* v. *Agee*, 453 U.S. at 305-306, 307-309.

Zemel v. *Rusk* shows that it was error for the court of appeals to subject the Cuban Assets Control Regulations to the scrutiny suggested by *Kent* v. *Dulles*. The rule that the courts should "construe narrowly" delegated powers that curtail the right to travel was created in the context of regulations that in effect told an American citizen that he must stay home. This Court has rejected the application of that very rule to delegated powers that merely told American citizens that they may not visit one particular country. *A fortiori*, the rule should not be applied to delegated powers that have only an incidental impact on the ability of our citizens to engage in ordinary private tourist and business travel to a country whose relations with the United States are subject to a comprehensive and longstanding trade and financial embargo.

4. Finally—and significantly—*Kent* raised questions about Congress's substantive constitutional power to regulate at all.[49] The passport denial in *Kent*, based solely on Kent's speech and associational activities, raised obvious First Amendment concerns. See *Haig* v. *Agee*, 453 U.S. at 304 ("*Kent* involved denials of passports solely on

[49] And, of course, *Aptheker* v. *Secretary of State*, *supra*, held that Congress in fact violated the Constitution in denying passports to all members of "Communist organizations."

the basis of political beliefs entitled to First Amendment protection."). It is in *that* context that the Court held that, if Congress is to regulate, it must clearly assert its will to do so.

Here there exists, in our view, no significant substantive constitutional concern. This Court has held that even direct passport controls may be imposed "on the basis of substantial reasons of national security and foreign policy." *Haig* v. *Agee*, 453 U.S. at 293. See also *Zemel* v. *Rusk*, 381 U.S. at 13.[50] As previously indicated, the Cuban Assets Control Program—which only incidentally affects travel—is a central constituent of our foreign and national security policies vis-a-vis Cuba. The United States clearly has a strong interest in limiting the flow of hard currency to Cuba, both directly and for the purpose of deterring development of a strong Cuban tourism industry. In addition, the ability to express serious disapproval of another country's behavior without the use of force, through economic sanctions, is a vital component of our foreign policy. See pages 34-35, *supra*.

"It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig* v. *Agee*, 453 U.S. at 307 (quoting *Aptheker* v. *Secretary of State*, 378 U.S. at 509). "The freedom to travel abroad * * * is subordinate to national security and foreign policy considerations; as such, it is subject

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[50] We note, too, that the Cuban Assets Control Regulations' effect on travel is on international, not interstate, travel. This Court has held that the interest in international travel, unlike the interest in interstate travel, is not a fundamental right. See, *e.g.*, *Califano* v. *Aznavorian*, 439 U.S. at 176-177; *Califano* v. *Torres*, 435 U.S. 1, 4 n. 6 (1978). Although the right of international travel "is a part of the 'liberty' of which the citizen cannot be deprived without due process of law" (*Kent* v. *Dulles*, 357 U.S. at 125), it is not a First Amendment right. See *Zemel* v. *Rusk*, 381 U.S. at 16-17. Thus, courts have not applied the most exacting level of scrutiny to otherwise valid provisions that have the effect of restricting international travel. See *Haig* v. *Agee*, 453 U.S. at 306-307; *Califano* v. *Aznavorian*, 439 U.S. at 177; *Califano* v. *Torres*, 435 U.S. at 4 n.6; *Zemel* v. *Rusk*, 381 U.S. at 16-17.

to reasonable governmental regulation." *Haig* v. *Agee*, 453 U.S. at 306. On several occasions, courts have concluded that the strong interests that underlie the operation of foreign assets control programs under the TWEA are sufficient to justify even actions allegedly infringing on First Amendment rights. See *Veterans & Reservists for Peace in Vietnam* v. *Regional Commissioner of Customs*, 459 F.2d 676 (3d Cir.), cert. denied, 409 U.S. 933 (1972); *Teague* v. *Regional Commissioner of Customs*, 404 F.2d 441 (2d Cir. 1968), cert. denied, 394 U.S. 977 (1969); *American Documentary Films, Inc.* v. *Secretary of the Treasury*, 344 F. Supp. 703, 710 (S.D.N.Y. 1972). And see *Haig* v. *Agee*, 453 U.S. at 308-309; *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980); *Brown* v. *Glines*, 444 U.S. 348, 354-358 (1980); *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972); *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968).

The impact of the disputed regulation on the freedom to travel is narrow. It applies only to a single country—Cuba. Respondents are free to travel elsewhere and to spend as much as they want. In addition, the regulation does not prohibit all travel to Cuba. Its primary impact is on economic transactions incident to ordinary private business and tourist travel. Journalists, professional researchers, close family members, those whose travel expenses are paid for entirely by Cuba, those traveling for humanitarian reasons, and artists and athletes performing in Cuba are not covered by the proscription. The national security and foreign policy interests underlying the Cuban Assets Control Program provide ample constitutional space for such narrowly drawn restrictions.

B. The court of appeals also cited a 1978 amendment to the Passport Act, 22 U.S.C. 211a, in support of its narrow reading of the grandfather clause. That amendment limits the Secretary of State's authority to impose area restrictions on the use of United States passports. Although the amendment does not purport to limit the President's authority to regulate property transactions

under the TWEA, the court of appeals nevertheless concluded (Pet. App. 13a) that it was necessary to read the grandfather clause narrowly in order to harmonize it with the amendment to the Passport Act.

As we have noted, the court of appeals acknowledged (Pet. App. 12a) that the regulation at issue here could be promulgated using the procedures mandated by IEEPA. Thus, the amendment to the Passport Act clearly cannot be viewed as a bar to restriction of travel-related transactions under an emergency economic powers statute. Since nothing in the Passport Act amendment suggests that Congress favored IEEPA procedures over grandfathered TWEA procedures—or in any way adverted to the difference—whenever a regulation may have an incidental effect on international travel, it does not support the court of appeals' construction of the grandfather clause.

Moreover, nothing in the legislative history of the Passport Act amendment—which is addressed only to the Secretary of State, not to the President or the Secretary of the Treasury—indicates that Congress intended to cut back on the powers granted to the Executive under Section 5(b) of the TWEA. The regulation at issue here does not limit the use of passports; rather, it restricts only economic transactions incident to travel. Nor does the regulation have the same effect as an area restriction on passport use, because, as we explained above, it permits property transactions in connection with a number of classes of travel.

This Court has held that repeals by implication are not favored. See *TVA* v. *Hill*, 437 U.S. 153, 189-190 (1978); *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974). Thus, in the absence of any direct inconsistency with the amendment to the Passport Act and in the absence of any reference to exercise of emergency economic powers when Congress considered and enacted the amendment, it should not be assumed that Congress intended an implied partial repeal of the grandfather clause.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTES AND REGULATIONS INVOLVED

Prior to its amendment in 1977, Section 5(b)(1) of the Trading With the Enemy Act, 50 U.S.C. App. 5(b)(1), provided:

> During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> > (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
> >
> > (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.
>
> by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or

otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

Section 101(b) of Pub. L. No. 95-223, 91 Stat. 1625, provides:

> Notwithstanding the amendment made by subsection (a) the authorities conferred upon the President by section 5(b) of the Trading With the Enemy Act, which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, may continue to be exercised with respect to such country, except that, unless extended, the exercise of such authorities shall terminate (subject to the savings provisions of the second sentence of section 101(a) of the National Emergencies Act) at the end of the two-year period beginning on the date of enactment of

the National Emergencies Act [Sept. 14, 1976]. The President may extend the exercise of such authorities for one-year periods upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States.

Section 515.201 of the Cuban Assets Control Regulations, 31 C.F.R. 515.201, provides:

(a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of a foreign country designated under this part, or any national thereof, or such transactions involve property in which a foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect.

(1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States;

(2) All transactions in foreign exchange by any person within the United States; and

(3) The exporation or withdrawal from the United States of gold or silver coin or bullion, currency or securities, or the earmarking of any such property, by any person within the United States.

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or in-

strumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

(2) All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.

(c) Any transaction for the purpose or which has the effect of evading or avoiding any of the prohibitions set forth in paragraph (a) or (b) of this section is hereby prohibited.

(d) For the purposes of this part, the term "foreign country designated under this part" and the term "designated foreign country" mean Cuba and the term "effective date" and the term "effective date of this section" mean with respect to Cuba, or any national thereof, 12:01 a.m., e.s.t., July 8, 1963.

The present version of Section 515.560 of the Cuban Assets Control Regulations, 31 C.F.R. 515.560, provides:

Certain transactions incident to travel to and within Cuba.

(a) (1) *General license.* The transactions in paragraph (c) of this section are authorized in connection with travel to Cuba by:

(i) Persons who are officials of the United States Government or of any foreign government, or of any intergovernmental organization of which the United States is a member, and who are traveling on official business; (ii) persons who are traveling for the pur-

pose of gathering news, making news or documentary films, engaging in professional research, or for similar activities; or (iii) persons, and persons traveling with them who share a common dwelling as a family with them, who are traveling to visit close relatives in Cuba.

(2) For purposes of this section, the term "close relative" means spouse, child, grandchild, parent, grandparent, great grandparent, uncle, aunt, brother, sister, nephew, niece, first cousin, or spouse, widow, or widower of any of the foregoing. The term "close relative" also means mother-in-law, father-in-law, daughter-in-law, son-in-law, sister-in-law, or brother-in-law.

(3) The general license contained in this section does not authorize transactions in connection with tourist travel to Cuba, nor does it authorize transactions in connection with business travel undertaken for any purposes other than those set forth in paragraph (a) (1) of this section.

(b) *Specific Licenses.* Specific licenses authorizing the transactions in paragraph (c) of this section will be issued in appropriate cases to persons desiring to travel to Cuba for humanitarian reasons, or for purposes of public performances, public exhibitions, or similar activities.

(c) The following transactions are authorized in connection with travel to and within Cuba by persons licensed under paragraphs (a) and (b) of this section:

(1) All transportation-related transactions ordinarily incident to travel to and from Cuba.

(2) All transactions ordinarily incident to travel within Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there.

(3) The purchase in Cuba, and importation as accompanied baggage, of merchandise with a foreign

market value not to exceed $100 per person. This authorization may be used only once in every six consecutive months. Single copies of publications do not count against the $100 limit set forth in this subparagraph. For purposes of this section, the term "publications" includes books, newspapers, magazines, films, phonograph records, tapes, photographs, microfilm, microfiche, posters, and similar materials. All merchandise and publications obtained pursuant to this subparagraph shall be for noncommercial use only and shall not be resold.

(4) All transactions by any person incident to arranging or assisting travel by any other person or group of persons to, from, or within Cuba. This authorization includes arranging through transportation to Cuba; selling passage aboard a foreign carrier providing regularly scheduled service to Cuba from points outside the United States; chartering an aircraft or vessel; arranging hotel accommodations, ground transportation, local tours and similar travel activities in Cuba; transfer of funds to Cuba or any national thereof; and receipt from Cuba or a national thereof of consideration for authorized services.

(5) All transactions concerning aircraft or vessels incidental to their nonscheduled flights or voyages to, from, or within Cuba. This subparagraph does not authorize the carriage of any merchandise to and from Cuba, except accompanied baggage and merchandise, including publications, authorized by paragraph (c)(3) of this section.

(6) All transactions incident to the processing and payment of checks, drafts, traveler's checks, and similar instruments negotiated in Cuba by any person under the authority of this section.

(d)(1) This section does not authorize the processing and payment by persons subject to U.S. jurisdiction, such as credit card issuers or intermediary banks, of credit card instruments (e.g., vouchers,

drafts, or sales receipts) for expenditures in Cuba, and does not authorize a domestic credit card issuer, or a foreign credit card firm owned or controlled by U.S. persons, to deal with a Cuban enterprise or with a third-country party, such as a franchisee, in connection with the extension of credit to any person in Cuba.

(2) Persons subject to U.S. jurisdiction are hereby authorized to process and pay credit card instruments for expenditures in Cuba where such instruments are dated prior to May 15, 1982. The authorization contained in this subparagraph shall expire at the close of business on July 15, 1982.

(e) Persons who travel to Cuba for the purpose of gathering news, making news or documentary films, engaging in professional research, or for similar activities are authorized to acquire and import into the United States, as accompanied baggage or otherwise, such publications, as defined in paragraph (c)(3) of this section, as are directly related to their professional activities, without limitation as to value. Such merchandise may be acquired and imported only for their own professional use or that of their employers at the time of the travel, and may not be sold to other persons.

(f) Persons who travel in Cuba pursuant to provisions of this section shall not become nationals of Cuba solely because of such travel. This paragraph does not authorize any transaction prohibited by any other section of this part.

(g) This section does not authorize any person subject to the jurisdiction of the United States to make any investment in Cuba, establish any branch or agency in Cuba, or transfer any property to Cuba, except transfers by or on behalf of individual or group travelers, and aircraft or vessels, as expressly authorized in this section.

(h) *Professional research and similar activities.* (1) Paragraph (a)(1) of this section provides a

general authorization for travel to, from, and within Cuba for professional research. Those covered by the "professional research" authorization are full-time professionals who travel to Cuba to do research in their professional areas, whose research is specifically related to Cuba and will constitute a full work schedule in Cuba, and where there is a substantial likelihood of dissemination of the product of such research. No transactions related to tourist or recreational travel within Cuba are authorized under the general license for professional research, except those that are consistent with a full schedule of research activities.

(2) "Similar activities" include attendance by professionals with an established interest in Cuba at professional meetings where research on Cuba is shared, and travel for research purposes specifically related to Cuba by persons who are working to qualify themselves academically as professionals (*e.g.*, certain graduate degree candidates). Study visits to Cuba in connection with pre-college or undergraduate college course work are not within the scope of professional research and similar activities authorized by the general license.

(3) Categories of travel which do not qualify as professional research or similar activities and for which specific license requests will normally be denied include recreational travel; tourist travel; travel in pursuit of a hobby; general study tours; general orientation visits; student class field trips; youth camps; research for personal satisfaction only; travel by fishing or bird-watching groups and similar affinity groups; and any travel for an authorized research purpose, if the schedule of activities includes free time, travel, or recreation in excess of that consistent with a full work schedule of professional research and similar activities.

(4) A group does not fall within the general license for professional research or similar activities

merely because some members of the group could qualify individually under the general license. For example, the presence of a professional fish biologist who travels to Cuba to engage in professional research does not bring within the general license other persons who might travel with the fish biologist but whose principal purpose in travel is to engage in recreational or trophy fishing. The fact that such persons may engage in certain activities with, or under the direction of, the professional fish biologist, such as measuring or recording facts about their catch, does not bring these individuals' activities within the meaning of professional research or similar activities.

(5) A person does not fall within the general license for professional research or similar activities merely because that person is a professional who plans to travel to Cuba. For example, a professor of history interested in traveling to Cuba for the principal purpose of learning or practicing Spanish or attending general lectures devoted to Cuban culture and contemporary life would not fall within the general license. A doctoral candidate in economics traveling to Cuba to undertake research for a dissertation on the Cuban economy would fall within the general license for activities directly related to the research but would not be authorized by the general license to stay an extra week in Cuba in order to attend a seminar on Cuban arts and crafts.

(i) *Professional Meetings, Seminars, Conferences.* Specific licenses authorizing the transactions in paragraph (c) of this section will be issued in appropriate cases to persons desiring to travel to Cuba for purposes of participation in professional meetings, seminars, conferences, or similar gatherings, provided that the prospective traveler is a full-time professional in the field to which the meeting or similar gathering pertains; that planning and preparation

for the meeting or similar gathering were underway prior to May 15, 1982; and that the meeting or similar gathering is scheduled to be held prior to December 31, 1982. Specific license requests pertaining to travel for attendance at professional meetings to be held after December 31, 1982, will generally be denied.

(j) For purposes of this section, all necessary transactions involving fully sponsored or hosted travel to, from, and within Cuba are authorized, provided that no person subject to U.S. jurisdiction shall make any payment or transfer of any property or provision of any service to Cuba or a Cuban national in connection with such travel. Travel shall be considered fully sponsored or hosted for purposes of this section notwithstanding a payment by a person subject to U.S. jurisdiction for transportation to and from Cuba, provided that the carrier furnishing the transportation is not a Cuban national.

The version of Section 515.560 of the Cuban Assets Control Regulations in effect from March 1977 through May 1982, 31 C.F.R. 515.560 (1977), provided:

Certain transactions incident to travel to and in Cuba.

(a) The following transactions are authorized:

(1) All transactions ordinarily incident to travel to and from Cuba.

(2) All transactions ordinarily incident to travel in Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there.

(3) The purchase in Cuba, and importation as accompanied baggage, of merchandise with a foreign market value not to exceed $100 per person, for personal use only. Such merchandise may not be resold. The authorization in this subparagraph may only be used once in every six consecutive months.

(4) All transactions by any person incident to arranging or assisting travel by any other person or group of persons, to, from, or in Cuba. This authorization includes arranging through transportation to Cuba; selling passage aboard a foreign carrier providing regularly scheduled service to Cuba from points outside the United States; chartering an aircraft or vessel; arranging hotel accommodations in Cuba; ground transportation, local tours and similar travel activities in Cuba; transfer of funds to Cuba or any national thereof; and receipt from Cuba or a national thereof of consideration for authorized services.

(5) All transactions on behalf of aircraft or vessels incidental to nonscheduled flights or voyages to, from, and in Cuba. This paragraph does not authorize the carriage of any merchandise to and from Cuba except accompanied baggage and merchandise authorized by paragraph (a)(3) of this section.

(6) All transactions incident to the processing and payment of checks, drafts, traveler's checks, and similar instruments negotiated in Cuba by any person under the authority of this section.

(7) Processing and payment by United States credit card issuers of credit card instruments (vouchers, drafts, or sales receipts) for authorized expenditures in Cuba forwarded by credit card companies in third countries to the domestic issuer for payment or reimbursement. Foreign credit card firms owned or controlled by U.S. persons are authorized to contract with a Cuban enterprise for the extension of credit through the use of credit cards. However, this paragraph does not authorize a domestic credit card issuer to contract with a Cuban enterprise for the extension of credit to any traveler for any purpose.

(b) Persons who travel to Cuba for the purpose of gathering news, making news or documentary films,

engaging in professional research or for similar activities are authorized to acquire and import into the United States, as accompanied baggage or otherwise, such photographs, films, books, magazines, newspapers, and similar publications as are directly related to their professional activities, without limitation as to value. Such merchandise may only be acquired and imported for their own professional use or that of their employers at the time of the travel, and may not be sold to other persons.

(c) Persons who travel in Cuba after March 18, 1977, and who prior to that date were not designated nationals of Cuba are licensed as unblocked nationals. This subparagraph does not authorize any transaction prohibited by any other section of this part.

(d) This section does not authorize any person subject to the jurisdiction of the United States to make any investment in Cuba, establish any branch or agency in Cuba, or transfer any property to Cuba except transfers by or on behalf of individual or group travelers, and aircraft or vessels, as authorized in this section.

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